Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

John M. O'Quinn, *Petitioner*,

v.

Donna C. Kline, *Respondent.*

Petition for Writ of Certiorari to the
Court of Appeals of Texas, Hosuton [14th District]

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

VOLUME 1

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April 10, 1995

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APPENDIX A

Affirmed as Modified; Majority and Dissenting Opinions filed March 24, 1994.

(Seal)

In The
Fourteenth Court of Appeals

No. A14-93-00187-CV

DONNA C. KLINE, Appellant
V.
JOHN M. O'QUINN, THOMAS J. PEARSON, AND BANK ONE, TEXAS, N.A.,
Appellees

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 91-09787

MAJORITY OPINION

This is an appeal from a judgment modifying an arbitration award which was rendered in favor of appellant, Donna Kline, and against John O'Quinn, and Thomas Pearson. The judgment modified the arbitration award by deleting punitive damages assessed against appellee, O'Quinn and ordered that Kline take nothing in a trial against appellee, Bank One (successor-in-interest to MBank, N.A.). Although his name appears on the appeal bond, Pearson did not file a brief or raise points of error.

This dispute between attorneys arose out of a contract for contingent attorney's fees. On March 30, 1988, Kline and Pearson entered into an agreement with O'Quinn whereby O'Quinn agreed to pay expenses and assist on certain toxic tort and personal injury cases in return for a share of the attorney's fees ("the first attorneys' agreement"). Pursuant to their agreement, O'Quinn advanced substantial sums of money to Kline and Pearson. After signing the first attorneys' agreement, Kline and O'Quinn became aware that Bank One was a creditor of Pearson and that the bank claimed an interest in Pearson's share of attorney's fees in cases covered by the attorneys' agreement. As a result, Kline, Pearson and O'Quinn executed a second agreement ("the second attorneys' agreement).

Both agreements detailed a fee-sharing arrangement and contained a binding arbitration clause. In addition, the second attorneys' agreement acknowledged the existence of Bank One's interest and allocated to the bank, a portion of Pearson's share of fees in cases covered by the agreement. The agreement also provided that a portion of Pearson's fees would be used repay to O'Quinn for money he advanced to Kline and Pearson. The agreement further provided for repayment of a Pearson debt to Kline. Finally, the agreement, contained several provisions to protect the fee interests of Kline and O'Quinn. Among those provisions, was a condition that all settlement monies recovered in the cases covered by the agreement would be deposited in O'Quinn's client trust account for accounting and distribution.

Kline, Pearson, and O'Quinn then executed an agreement with Bank One ("the bank agreement"), which for the most part restated the provisions set out in the second attorneys' agreement but did not contain an arbitration provision. Thereafter, recoveries, either by settlement or by judgment, were received by both O'Quinn and Pearson on cases covered by the second attorneys' agreement. However, Kline was paid only a portion of her share of fees or not paid at all.

On March 8, 1991, Kline filed suit against O'Quinn and Pearson, alleging breach of contract, breach of fiduciary duty, and breach of a duty of good faith and fair dealing because of their failure to pay her certain contingent attorneys fees. Kline's original petition specifically invoked the arbitration provision of the second attorneys' agreement and prayed "that the court order arbitration of the disputes between Plaintiff and Defendants O'Quinn and Pearson." Bank One was named as a defendant, but no wrongdoing was alleged against the bank as it was not a party to the second attorneys' agreement. O'Quinn then filed a plea in abatement with the court to stay the proceedings pending arbitration. The court took no action on O'Quinn's motion.

Pursuant to the second attorneys' agreement, Kline filed a demand for arbitration with the American Arbitration Association (AAA). Kline also submitted a copy of her original petition to the AAA. The parties proceeded to arbitration in May 1992, and on June 22, 1992, the three-member arbitration panel found in favor of Kline and ordered both O'Quinn and Pearson to pay damages.[1]

O'Quinn's subsequently filed with the AAA, a "motion to partially modify and vacate arbitration." The arbitration panel affirmed its prior rulings and denied O'Quinn's motion on September 3, 1992. O'Quinn then filed a "motion to vacate, or alternatively, modify and correct

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[1] O'Quinn was ordered to pay Kline $249,316.02 plus pre-award interest of $41,552.67 and post-award interest. O'Quinn was also ordered to pay $50,000.00 in punitive damages. Pearson was ordered to pay Kline $105,523.20 plus pre-award interest of $17,587.20 and post-award interest. Pearson was also ordered to pay $25,000.00 in punitive damages. Kline was further awarded $1,261.23 from a case expense account funded by O'Quinn and $500.00 remaining in her own client trust fund.

arbitration award" in the trial court. That motion, like the earlier motion to the AAA, requested deletion of the $50,000.00 punitive damages award assessed against O'Quinn by the arbitrators.

Shortly thereafter, Kline filed an "application for decree," seeking confirmation of the arbitration award in its entirety. She also filed a first amended original petition, seeking confirmation of the award and alleging, for the first time, causes of action against Bank One. That pleading also sought attorney's fees. Kline later amended her petition in the trial court to include a claim for punitive damages against O'Quinn in the event that the arbitration award was not confirmed in its entirety. O'Quinn also filed a motion opposing Kline's application for decree and a "motion for judgment," both of which sought to confirm the arbitration award, less punitive damages.

The pleadings and documents in the record show that the trial court held several hearings to resolve issues raised by O'Quinn's motion to vacate or modify. A record of what transpired at all those hearings is not before this court. However, notwithstanding the lack of a complete record, an examination of the pleadings and documents and a review of the record of the pre-trial hearing in the Bank One case, reflect the totality of the trial court's rulings. The trial court ruled that the arbitrators had exceeded their authority by awarding punitive damages and by ordering payment of the award within thirty days after the award was signed. The court also ruled that Kline could not recover attorney's fees. The court further ruled that it would confirm the arbitration award, less punitive damages against O'Quinn, but refused Kline's request to litigate that issue or the issue of attorney's fees. The trial court then ruled that it would not enter judgment confirming the arbitration award as modified until the conclusion of the trial against Bank One.

The Bank One trial began on December 21, 1992. During the pre-trial hearing, the court ruled that because of its prior rulings, there were no issues to be litigated against O'Quinn; therefore, counsel for O'Quinn was not permitted to participate in the Bank One trial. After Kline rested, Bank One moved for a directed verdict, and after hearing argument, the trial court granted the motion. The trial court's final judgment, confirmed the arbitrators' award except for the punitive damages against O'Quinn, denied Kline's request for attorney's fees, and ordered that Kline take nothing from Bank One. Kline appeals from that final judgment raising three points of error. O'Quinn has since paid the compensatory damages of the final judgment and has filed a motion to dismiss this appeal.

Initially, we address O'Quinn's motion to dismiss. Exhibits attached to that motion reflect O'Quinn's payment and Kline's acceptance of compensatory damages plus interest pursuant to the trial court's final judgment. O'Quinn contends that Kline's acceptance of this payment satisfied the judgment and makes this appeal moot. O'Quinn's contention is without merit.

The general rule is that a party who accepts the benefits of a judgment is estopped from challenging the judgment by appeal. *Twin City Fire Ins. Co. v. Jones*, 834 S.W.2d 114, 115 (Tex. App.--Houston [1st Dist.] 1992, writ denied) (citing *Carle v. Carle*, 149 Tex. 469, 234 S.W.2d 1002, 1004 (1951)). There are two narrow exceptions to this rule. *Twin City*, 834 S.W.2d 115; *River and Beach Land Corp. v. O'Donnell*, 632 S.W.2d 885, 888 (Tex. App.--Corpus Christi 1982, no writ). First, a party is not estopped from appealing if a reversal of the judgment could not possibly effect that party's right to the benefit accepted under the judgment. *Id.* (citing *Carle*, 234 S.W.2d at 1004); *River and Beach*, 632 S.W.2d at 888. Second, a party is not estopped from appealing if the economic circumstances are such that the party's acceptance of the benefits was not voluntary. *Twin City*, 834 S.W.2d at 115;

River and Beach, 632 S.W.2d at 888. This case falls within the first exception.

The compensatory damages paid by O'Quinn and accepted by Kline were never the subject of this appeal. By her appeal, Kline only seeks "further" recovery of the punitive damages deleted from the arbitration award and attorney's fees in confirming the award. Thus, reversal of the judgment would merely allow Kline to recover a sum of money in addition to compensatory damages already accepted by her and would have no effect on those benefits she has secured under the judgment. *See Baptist Memorial Hosp. Sys. v. Bashara*, 685 S.W.2d 352, 353-54 (Tex. App.--San Antonio 1984), aff'd, 685 S.W.2d 307 (Tex. 1985) (held that hospital's acceptance of lien payment reduced by amount of attorney's fees of attorney representing injured client did not bar hospital from seeking higher lien payment on appeal). O'Quinn's motion to dismiss is denied.

In her first point of error, Kline contends "the trial court erred by rejecting rather confirming the arbitration award of exemplary damages against O'Quinn."

The trial court's judgment setting aside the award of punitive damages against O'Quinn states that ". . . such award fail[ed] to conform either to the parties' arbitration agreement or the relief sought . . ." and that ". . . the arbitrators exceeded the scope of their authority in attempting to award punitive damages." That "arbitrators exceeded their powers" is a statutory ground for vacating an award. TEX. CIV. STAT. ANN. art. 237, §A(3). That "arbitrators have awarded upon a matter not submitted to them" is a statutory ground for modifying or correcting an award. TEX. CIV. STAT. ANN. art. §238 A(2). Here, the trial court did not vacate the arbitration award, it only modified the award by deleting the punitive damages against O'Quinn. Therefore, the only issue before this court is: was the issue of punitive damages submitted to the arbitrators?

It is undisputed that: (1) in Texas, punitive damages may be awarded under appropriate circumstances, *see Transportation Ins. Co. v. Moriel*, 37 Sup. Ct. J. 450, 457-60 (February 2, 1994); (2) the trial court did not enter an order setting out the issues to be considered by the arbitrators or an order limiting the issues to be considered by the arbitrators; and, (3) the trial court did not know what evidence or issues were submitted to the arbitration panel because no record was made of the arbitration proceedings. Thus, the trial court's holding that the arbitration panel's award "failed to conform to the parties' arbitration agreement or relief sought" was of necessity limited to the construction of that agreement.

There is no dispute that the award was the result of binding statutory arbitration pursuant to the second attorneys' agreement, that the arbitration proceedings were in accordance with the Commercial Arbitration Rules rules of the AAA, that this court has jurisdiction, and that Texas law is applicable.

The second attorneys' agreement provided for *binding* arbitration in accordance with the rules of the AAA and that any court having jurisdiction could enter judgment on the award.

The arbitration provision in the second attorneys' agreement provided:

> Binding Arbitration. - In the event that *a dispute* arises among the Parties hereto, the Parties covenant to endeavor in good faith to resolve the dispute amicably. In the event that *a dispute* arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American

> Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The expenses of arbitration shall be shared equally among or between the arbitrating parties but each party shall be responsible for the fees of its own counsel. Said arbitration shall take place within thirty (30) days of request by any party, unless any party to the arbitration shall be in trial at the time in which case it shall take place within thirty (30) days after such trial is concluded.

[emphasis added]

Whether the parties' agreement imposes a duty to arbitrate a particular dispute is a matter of contract interpretation and a question of law for the court. *The Babcock & Wilcox Co. v. PMAC, Ltd.*, 863 S.W.2d 225, 230 (Tex. App.--Houston [14th Dist.] 1993, writ pending); *Lost Creek Util. v. Travis Indus, Painters*, 827 S.W.2d 103, 105 (Tex. App.--Austin 1992, writ denied). The law imposes a presumption in favor of arbitration which requires, whenever the scope of an arbitration is fairly debatable or reasonably in doubt, that the court decide the question of interpretation in favor of arbitration. *Babcock*, 863 S.W.2d at 230. This presumption is particularly applicable where the clause is broad, purporting to cover all claims, disputes, and other matters relating to the contract or its breach. *See Babcock*, 863 S.W.2d at 230; *see also Lost Creek.*, 827 S.W.2d at 105. Where there is a broad arbitration clause, arbitration of a particular grievance should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Babcock*, 863 S.W.2d at 230; *Lost Creek.*, 827 S.W.2d at 105.

Kline contends that the parties contemplated arbitration of her tort claims and thus, punitive damages, when they agreed to arbitrate "a dispute that arises among the parties." We agree. Ordinary principles of contact law require

us to ascertain the true intentions of the parties as expressed in the *entire* contract. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). [emphasis added] Language used by the parties in contract should be accorded its plain grammatical meaning unless it definitely appears that the intentions of the parties would be thereby defeated. *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985). We must avoid, when possible and proper, a construction which is unreasonable, inequitable and oppressive. *Reilly v. Rangers Management Inc.*, 7272 S.W.2d 527, 530 (Tex. 1987).

Applying those principles to the above provision, we hold that the phrase, "a dispute that arises among the parties," in the absence of limiting language, encompasses Kline's tort causes of action and claim for punitive damages. *See USX Corp. v. West*, 781 S.W.2d 453, 455 (Tex. App.--Houston [1st Dist.] 1989, no writ) (holding that a "controversy" between parties may encompass different causes of action and claims for different types of damages, including punitive damages). Our broad reading of the arbitration provision is supported by O'Quinn's own pleadings. In his plea in abatement filed in the trial court prior to arbitration, O'Quinn declared that the arbitration provision provided for arbitration of "any and all controversies or claims arising out of or relating to the agreement."

Notwithstanding that pleading, O'Quinn now argues that the pleadings and proof submitted to the arbitrators by Kline do not support an award of punitive damages. There is nothing in our record to support or corroborate O'Quinn's argument. While a court may review whether a particular issue is within the scope of the parties' arbitration agreement, the enforcement of pleading requirements before the arbitrator is a procedural matter for the arbitrator. *See USX*, 786 S.W.2d 453 at 456.

In *USX*, Energy Buyers Service Corp. (Energy Buyers) asserted several causes of action arising from USX

Corp.'s (USX) alleged breach of a contract for the purchase of natural gas. 781 S.W.2d 454. The First Court of Appeals refused USX's attempt to mandamus the trial judge to require him to grant a motion to compel arbitration of certain tort claims asserted by Energy Buyers. *Id.* The court's refusal was based in part on its broad reading of the arbitration provision in the contract. 781 S.W.2d 454-56. The court reviewed both the arbitration agreement and documents filed in the pending arbitration before concluding that the claims asserted by Energy Buyers, including a claim for punitive damages, were before the arbitrator. 781 S.W.2d 455-56. Although Energy Buyers' pleading did not specifically refer to punitive damages, the court held that the enforcement of pleading requirements before an arbitrator is ordinarily a procedural matter for the arbitrator. *USX*, 781 S.W.2d at 456.

In so holding, the court in *USX* relied on *John Wiley & Sons v. Inc. v. Livingston*, 376 U.S. 543, 84 S. Ct. 909, 11 L. Ed. 898 (1964). In *Wiley*, a union sought to compel the corporate employer to arbitration pursuant to a collective bargaining agreement with the corporate employer who had merged with another corporation. 84 S. Ct. at 911. At issue, was whether the collective bargaining agreement survived the merger and whether arbitrators could decide whether certain procedural prerequisites to arbitration set out in the agreement had been satisfied. *Id.* As to the latter issue, the U.S. Supreme Court held that "*once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.* *Id.* at 918. [emphasis added] The court explained that "even under a contrary rule, a court could deny arbitration only if it could be said not only that a claim was strictly 'procedural,' and therefore within the purview if the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify the arbitral award." *Id.*

The court in *USX* also relied on *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145 (5th Cir. 1987). In *Webb*, a general contractor sought to compel the property owner and architect to arbitration. 823 F.2d at 146. The property owner and architect argued that the contractor did not comply with the contractual prerequisites to arbitration. *Id.* The district court made a finding to the contrary. 823 F.2d at 149. The court, citing *Wiley* and section 4 of the Federal Arbitration Act, vacated the district court's finding and held that only the arbitrators could decide the issue of the contractor's compliance. *Id.*

We agree with the holdings of *Wiley*, *Webb* and *USX*. O'Quinn's "pleadings" argument is not, as the U.S. Supreme Court explained, a "strictly procedural claim" which would operate to bar the arbitration altogether. Further, O'Quinn's claim bears on the final disposition of the parties' dispute in the sense that he seeks to interpret the scope of the arbitration agreement by reference to extrinsic evidence, i.e., Kline's pleadings. However, O'Quinn has never claimed that the parties agreement is ambiguous. In any event, the second attorneys' agreement specifically states that it "constitutes the entire agreement of the parties." Because we have already held that the arbitration provision in that agreement was broad enough to encompass Kline's tort causes of action and claim for punitive damages, we must defer to the arbitrators with regard to procedural matters such as the sufficiency of Kline's pleadings.

As to O'Quinn's argument that Kline did not prove in the arbitration that she was entitled to the punitive damages, we, like the trial court, do not have a record of the arbitration and are unable to determine what claims were submitted or what evidence was offered before the arbitrators. Without a transcription of the arbitration proceedings, we must presume adequate evidence to support the award. *House Grain Co. v. Obst*, 659 S.W.2d 903, 906 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.).

O'Quinn next asserts that relitigation of punitive damages is barred by the doctrine of *res judicata*. While that may be true, Kline seeks to litigate the issue of punitive damages only in the event that we find that such an issue was not within the scope of the parties' arbitration agreement. Because we have determined that the issue of punitive damages was within the scope of the parties' agreement, we need not address O'Quinn's res judicata argument.

O'Quinn further contends that an award of punitive damages in an arbitration violates due process under the U.S. and Texas Constitutions. This argument is without merit. O'Quinn asserts that punitive damages is a sanction reserved to the forum of the courts where there are procedural safeguards such as judicial review. Because O'Quinn did not raise this argument in the trial court, it was waived. *Johnson v. Lynaugh*, 800 S.W.2d 936, 939 (Tex. App.--Houston [14th Dist.] 1990, writ denied). In fact, O'Quinn's only due process argument below was that he did not have sufficient notice that the arbitrators could award punitive damages. As evidenced by the allegations in his own pleadings, to wit; that the arbitration provision provided for arbitration of "any and all controversies or claims arising out of or related to the agreement," O'Quinn's position that he did not have notice that Kline might assert tort causes of action and a claim for punitive damages is untenable.

Lastly, O'Quinn asks us to adopt a public policy prohibiting punitive damages awards in arbitration. *See Garrity v. Lyle Stuart, Inc.*, 386 N.Y.S.2d 831, 353 N.E.2d 793 (1976). As an intermediate appellate court, it is not for us to forge the public policy of this State. Moreover, no Texas court has set aside a punitive damages award by arbitrators as being contrary to the public policy of this State and we refuse to do so. *See USX*, 781 S.W.2d at 455-56; *see also Grissom v. Greener & Sumner Constr. Co.*, 676 S.W.2d 709 (Tex. App.--El Paso 1984, writ ref'd n.r.e.) (citing TEX. CIV. STAT. ANN. art. article 237 §A(5) and holding that the trial court could not strike award of punitive damages as against public policy where the

parties expressly agreed to submit both contract and tort claims to arbitration).

Kline's first point of error is sustained.

In her second point of error, Kline contends "the trial court erred in not adjudicating the merits of [her] claim for post-arbitration attorney's fees against O'Quinn and Pearson."

Kline asserts that the trial court "summarily" denied her request for attorney's fees without an adjudication on the merits. She then proceeds to state the standard of review for summary judgments. This case does not involve an appeal from a summary judgment but an appeal from a proceeding to confirm an arbitration award. Moreover, pleadings and documents from that proceeding which are contained in the record reflect that Kline's request for attorney's fees was considered a number of times by the court and not "summarily" rejected.

As previously noted, the arbitration provision in the second attorneys' agreement specifically provided that "each party shall be responsible for the fees of its own counsel." Consistent with that provision, the arbitration award ordered that "each party shall bear its own attorney's fees." O'Quinn contends that Kline waived the right to attorney's fees because she did not complain about this aspect of the award within the ninety-day statutory period for modification. TEX. CIV. STAT. ANN. art. 238. We agree. The arbitration award was rendered on June 22, 1992, but Kline did not file her first amended original petition seeking attorney's fees in connection with confirmation of the award until September 24, 1992, ninety-four

days after the award was rendered.[2] Kline has waived any complaint regarding the arbitrators' award of attorney's fees.

Kline contends that a motion to modify was not required because the arbitration award refers only to recovery of attorney's fees incurred during the arbitration, not to "post-arbitration" attorney's fees. Kline asserts that her right to attorney's fees in connection with her efforts to confirm the award was never submitted to arbitration. She maintains that the court should have adjudicated the issue of "post-arbitration" attorney's fees or referred the matter to arbitration as "a dispute among the parties" which arose following arbitration.

We disagree with Kline's contention that the arbitration award does not apply to proceedings to confirm the award. Confirmation of an arbitration award is part and parcel of the arbitration process. *See* TEX. CIV. STAT. ANN. arts. 235, 236 (Vernon 1973). Kline invoked the jurisdiction of the trial court by filing her original petition asking the court to order arbitration. As a result, Kline was required as part of the arbitration enforcement process to return to the trial court to confirm the award and make it into an enforceable final judgment. In view of the parties agreement to pay their own attorney's fees for arbitration, and in view of the fact that the arbitrators' award is consistent with that agreement, we find that the trial court properly refused to award attorney's fees to Kline.

We also note that Kline could not recover attorney's fees under the Civil Practices and Remedies Code

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[2] The arbitrators rendered a "second award," denying O'Quinn's initial motion to vacate or modify. That award was rendered on September 3, 1992. The question of whether this second award altered the time limits for bringing a motion to modify has not been raised on appeal and therefore, is not before us.

which sets forth the types of claims upon which attorneys fees are recoverable. Among those claims are claims for personal services rendered and claims on oral and written contracts. TEX. CIV. PRAC. & REM. CODE ANN. § 38.0001 (Vernon 1988). Whether the claims asserted by Kline are for personal services or based on contract, those claims have been merged into the arbitration award and her action to enforce that award gives rise to a new and different cause of action for which there is no statutory basis for recovery of attorneys' fees. *See Babcock*, 863 S.W.2d at 236 (holding that proceeding to confirm an arbitration award is in the nature of an enforcement proceeding, not a contract claim); *see also Kermacy v. First Unitarian Church of Austin*, 361 S.W.2d 734, 736 (Tex. App.--Austin 1962, writ ref'd n.r.e.) (holding that on claim for architectural services rendered, architect could not recover attorneys' fees in action to vacate arbitration award in his favor).

We hold that the trial court did not err in refusing to award attorney's fees in connection with Kline's post-arbitration efforts to confirm the award.

Kline's second point of error is overruled.

In her third point of error, Kline contends "the trial court erred in directing a verdict in favor of Bank One."

An instructed verdict is proper: (1) when a defect in the opponent's pleadings makes them insufficient to support a judgment; (2) when the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) when the evidence offered on a cause of action is insufficient to raise an issue of fact. *Anderson v. Vinson Exploration, Inc.*, 832 S.W.2d 657, 661 (Tex. App.--El Paso 1992, writ denied).

In reviewing the trial court's granting of a directed verdict, we must determine whether there is any evidence of

probative force to raise fact issues on the material questions presented. *Quantel Business Sys. v. Custom Controls*, 761 S.W.2d 302, 304 (Tex. 1988); *White v. Southwestern Bell Tel. Co.*, 651 S.W.2d 260, 262 (Tex. 1983); *Collora v. Navarro*, 574 S.W.2d 65, 68 (Tex. 1978). We must consider the evidence in the light most favorable to the party against whom the verdict was instructed, disregarding all contrary evidence and inferences. *Quantel*, 761 S.W.2d at 304; *White*, 651 S.W.2d at 262, *Collora*, 574 S.W.2d at 68. If there is any conflicting evidence of a probative nature on a material issue, the directed verdict is improper and the judgment must be reversed and the case remanded for the jury's determination of that issue. *Quantel*, 761 S.W.2d at 304; *White*, 651 S.W.2d at 262.

In her third amended original petition, Kline alleged causes of action against Bank One for breach of contract, breach of good faith and fair dealing, and for "knowingly and actively participating in breaches of fiduciary duty" by O'Quinn and Pearson. The trial court granted a directed verdict on Kline's breach of contract claim on the ground that Bank One had no duty under the bank agreement to account for funds to Kline. It also granted a directed verdict on Kline's breach of good faith and fair dealing claim because no "special relationship" giving rise to such a claim existed between Kline and Bank One. Finally, the trial court granted a directed verdict on Kline's breach of fiduciary duty claim because Bank One's conduct did not enable O'Quinn or Pearson to breach any fiduciary duty.

While her argument focuses primarily on the breach of fiduciary duty, Kline argues generally that the trial court erred in concluding that Bank One owed "no duty." Kline's argument fails. Bank One owed no duty to Kline under the bank agreement because that agreement merely allocated a portion of the Pearson's share of fees in certain cases to Bank One. It designated the cases covered by the agreement and specified Pearson's share of the fees in those cases. The bank agreement did not impose any affirmative obligation or duty on

Bank One to account for Kline's share of fees or to assert a claim on her behalf.

As for Kline's allegations of breach of a duty of good faith and fair dealing, Bank One did not owe such a duty as a matter of law. The courts of this State do not generally recognize the existence of a "special relationship" giving rise to an independent duty of good faith and fair dealing in contract outside of the insurance context or the public sector. *See Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 595, n. 5 (Tex. 1992); *see also Houston Cable TV, Inc. v. Inwood West Civic Ass'n.*, 839 S.W.2d 497, 503 (Tex. App.--Houston [14th Dist.] 1992), *writ dism'd per curiam*, 860 S.W.2d 22 (Tex. 1993) (on motion for rehearing).[3] In any event, we find no evidence of a special relationship between Kline and Bank One sufficient to give rise to an independent duty of good faith and fair dealing.

As for Kline's breach of fiduciary duty claim, "it is settled law of this State that where a third party knowingly participates in the breach of duty of a fiduciary, such third party becomes joint a tortfeasor with the fiduciary and is liable as such." *Kinzbach Tool Co. v. Corbett Wallace Corp.*, 138 Tex. 565, 160 S.W.2d 509, 514 (1942); *Tinney v. Team Bank*, 819 S.W.2d 560, 564 (Tex. App.--Fort Worth 1991, writ denied); *Horton v. Robinson*, 776 S.W.2d 260, 266 (Tex. App.--El Paso 1989, no writ); *Chien v. Chen*, 759 S.W.2d 484, 487 n. 2 (Tex. App.--Austin 1988, no writ). Thus, Bank One cannot be liable

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[3] Where the Supreme Court, upon the parties' joint motion, grants an application for writ of error, sets aside judgments of the Court of Appeals and the trial court without reference to the merits, and remands to trial court for entry of judgment in accordance with the settlement agreement of the parties, the Court of Appeals' opinion is not vacated and its precedential value is equivalent to a "writ dismissed" case. 860 S.W.2d at 73 n. 3.

to Kline unless O'Quinn and Pearson owed her a fiduciary duty.

A fiduciary duty arises from the relationship of the parties and not just from the contract. *See Crim Truck*, 823 S.W.2d at 594-97. A fiduciary relationship exists when the parties are under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation. *American Medical Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 339 (Tex. App. -- Houston [14th Dist.] 1991, no writ) (opinion on motion for rehearing). It exists where a special confidence is placed in another who is bound to act in good faith and with due regard to the interests of the one placing confidence. *Id.* A fiduciary relationship may include informal relationships such as moral, social, domestic or purely personal relationships that are created by one party placing implicit trust and reliance on another. *Id.* However, a fiduciary relationship is extraordinary one and will not be lightly created; the mere fact that one subjectively trusts another does not alone, indicate that confidence is placed in another in the sense demanded by fiduciary relationships because something apart from the transaction between the parties is required. *Id.* As the Supreme Court recently explained:

> The fact that one businessman trusts another, and relies upon his promise to perform a contract does not rise to a confidential relationship. Every contract includes an element of confidence and trust that each party will faithfully perform his obligation under the contract. Neither is the fact that the relationship has been a cordial one, of long duration, evidence of a confidential relationship.

Crim Truck, 823 S.W.2d at 594-95.

Thus, not every business relationship gives rise to a fiduciary duty. *See Crim Truck*, 823 S.W.2d at 594-97. The question of whether a confidential relationship exists giving rise

to an informal fiduciary relationship is ordinarily one of fact, unless the issue is one of "no evidence;" then it is a question of law. *Id.* at 594. Because a directed verdict presents a question of "no evidence," we are dealing with a question of law.

At least one other court has recognized the existence of a fiduciary relationship between a named partner in a law firm and his associates. *Bray v. Squires*, 702 S.W.2d 266, 270 (Tex. App.--Houston [1st Dist.] 1985, no writ) (citing *Kinzbach* and holding that a lawyer's duty to make full disclosure to other members of firm about matters affecting firm business was incident to the parties' employer-employee relationship). Here, the second attorneys' agreement provided that the parties were to treat each other "fairly and in good faith" and that "Kline would be an "associate" of O'Quinn's law firm "for purposes of the agreement." The agreement also provided that "monies recovered or received by way of settlement" were to be deposited in O'Quinn's client trust account "for accounting and distribution.

We are unwilling to impose a fiduciary duty upon O'Quinn and Pearson simply because of their business ties to Kline. The parties freely negotiated the terms of their agreement. Neither the allegations in Kline's third amended petition nor the evidence presented at trial give rise to a fiduciary duty outside of the second attorneys' agreement. The only evidence of a confidential relationship is Kline's testimony that she trusted O'Quinn to handle the settlement proceeds in accordance with the agreement and her testimony that she and Pearson had been acquainted over a period of time, that they had shared an office for several months, and that they had participated in a long trial together. We hold that such evidence amounts to no more than a mere scintilla and is no evidence. *See Crim Truck*, 823 S.W.2d at 594-95; *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

We hold that the trial court correctly ruled that O'Quinn and Pearson did not owe a fiduciary duty to Kline and

properly directed a verdict in favor of Bank One on this cause of action.

Kline's third point of error is overruled.

We reverse that part of the trial court's judgment striking the arbitrators' award of $50,000.00 in punitive damages and render judgment that Kline recover from O'Quinn $50,000.00 in punitive damages. The remainder of the trial court's judgment is affirmed.

/s/ Jackson B. Smith, Jr.
Justice (retired)*

Judgment rendered and Opinion filed March 24, 1994.

Panel consists of Justices Murphy, Ellis and Smith.

Publish - TEX. R. APP. P. 90.

* Justice Smith sitting by assignment of the Texas Supreme Court.

APPENDIX B

Affirmed as Modified; Majority and Dissenting Opinions filed March 24, 1994.

(Seal)

In The
Fourteenth Court of Appeals

No. A14-93-00187-CV

DONNA C. KLINE, Appellant
V.
JOHN M. O'QUINN, THOMAS J. PEARSON, AND BANK ONE, TEXAS, N.A.,
Appellees

On Appeal from the 280th District Court
Harris County, Texas
Trial Court Cause No. 91-09787

DISSENTING OPINION

I agree with the court's opinion regarding attorney's fees and the directed verdict rendered in favor of Bank One. However, I respectfully dissent from that part of the court's opinion upholding the arbitrators' award of punitive damages.

Kline submitted a Demand For Arbitration and a copy of her Original Petition to the AAA. The Demand for Arbitration, which was submitted to the AAA first, defines the

"nature of the dispute" as a "disagreement among attorneys over contingent fee recoveries." As to the "claim or relief sought," Kline's demand states only that an amount "is unable to be determined without discovery from respondents." The demand does not mention tort claims or punitive damages. The subsequent cover letter to the AAA accompanying her Original Petition declares that this pleading "states Ms. Kline's position on the matters in controversy **more clearly** than the papers previously submitted." As evidenced by Kline's correspondence to the AAA, Kline's Original Petition was intended to define the claims before the arbitrators as stated in her Demand for Arbitration and the parties' agreement.

O'Quinn contends that he relied on Kline's Original Petition in preparing his defense in the arbitration and that Kline's petition does not support a recovery of punitive damages as a matter of law. O'Quinn's contention is correct. The majority cites *USX* in holding that we are unable to review the sufficiency of pleadings before the arbitrators. However, in *USX*, the court reviewed the broad arbitration provision in the parties' contract, the commercial rules of arbitration, and documents filed in the arbitration before determining that the issue of punitive damages was before the arbitrators. *USX Corp. v. West*, 781 S.W.2d 453, 455 (Tex. App.--Houston [1st Dist.] 1989) (original proceeding).

In contrast to the arbitration provision in *USX*, I would not read the arbitration provision in this case as broadly as the majority does. The arbitration provision at issue here provides that the parties would arbitrate "a dispute," not "any controversy." *See USX*, 781 S.W.2d at 454. Kline specifically informed the AAA that "a dispute" meant a "disagreement among attorneys over contingent fee recoveries." In other words, a dispute about the subject matter of the parties' contract. Section 43 of the Commercial Arbitration Rules of the AAA provides that "the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and **within the scope of the agreement of the parties** . . . ." COLUMBIA

UNIVERSITY, GUIDE TO INTERNATIONAL ARBITRATION AND ARBITRATORS, 137, 148 (2d ed. 1992). [emphasis added] In this case, Kline's claim for punitive damages is beyond the scope of the agreement of the parties.

Where an arbitration clause is narrowly drawn, judicial review of the arbitrator's jurisdiction as opposed to the merits of the arbitration award, is less deferential. *The Babcock & Wilcox Co. v. PMAC*, 863 S.W.2d 225, 230 (Tex. App.--Houston [14th Dist.] 1993, writ pending) (citing *Container Prods., Inc. v. United Steelworkers of Am. and Its Local 5651*, 873 F.2d 818, 819-20 (5th Cir. 1989)). In the instant case, we are confronted not only with a narrow arbitration provision, but also with a pleading which was intended to broaden the scope of that provision. Therefore, I would not defer to the arbitrators with regard to the sufficiency of that pleading.[1]

In her Original Petition, Kline alleged causes of action against O'Quinn and Pearson for breach of contract, breach of a duty of good faith and fair dealing, and breach of a fiduciary duty. She alleged that O'Quinn and Pearson failed to pay her share of fees in the cases covered by the Second Attorneys' Agreement. Specifically, she alleged that O'Quinn

---

[1] Notwithstanding Kline's correspondence and pleadings submitted to the AAA, the majority points out that verbiage in O'Quinn's plea in abatement which requested arbitration of "all controversies or claims arising out of or relating to the [Second Attorneys'] Agreement" indicates that the arbitrators were to consider all matters, including punitive damages. As noted by the majority, the trial court never ruled on O'Quinn's plea in abatement nor was that motion submitted to the arbitrators. More importantly, that defensive pleading in no way enlarged or enhanced the allegations in Kline's Original Petition, which *was* submitted to the arbitrators.

and Pearson failed to disclose the receipt "in trust" of settlement proceeds in cases covered by their agreement and then disbursed those proceeds without her knowledge or consent. There was no allegation of constructive trust or fraud. There was also no allegation of conscious indifference on the part of O'Quinn or Pearson and no allegation that their conduct was likely to cause serious harm to Kline. *See Transportation Ins. Co. v. Moriel*, 37 Sup. Ct. J. 450, 458-59 (February 2, 1994).

"A dispute arising under or out of a contractual relationship may give rise to both breach of contract and tort claims at the same time since the breach of duty under the contract may involve tortious conduct." *Valero Energy Corp. v. Wagner & Brown II*, 777 S.W.2d 564, 566 (Tex. App.--El Paso 1989, writ denied). However, to recover punitive damages attendant to a contract dispute, a plaintiff must plead and prove a distinct tortious injury with accompanying actual damages. *See e.g. Moriel*, 37 Sup. Ct. J. at 455; *Southwestern Bell Tel. Co., v. DeLanney*, 809 S.W.2d 493, 494-95 (Tex. 1991) *International Bank, N.A. v. Morales*, 736 S.W.2d 622, 624 (Tex. 1987); *Texas Nat'l Bank v. Karnes*, 717 S.W.2d 901, 903 (Tex. 1983) (and cases cited therein); *Jim Walter Homes v. Reed*, 711 S.W.2d 617, 618 (Tex. 1986); *Belefonte Underwriters Co., v. Brown*, 704 S.W.2d 742, 744 (Tex. 1986). Punitive damages are not recoverable for breach of contract alone. *Karnes*, 717 S.W.2d at 903. In determining whether an action is in tort or in contract, we must look to the substance of the cause of action, not the manner in which it was pleaded. *Jim Walter Homes*, 711 S.W.2d at 618.

As stated by the Texas Supreme Court:

> The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury most often determines which duty or duties are breached. When the injury is only the

> economic loss to the subject of a contract itself the action sounds in contract alone.

Southwestern Bell Tel. Co, 809 S.W.2d at 495 (citing *Jim Walter Homes*, 711 S.W.2d at 618).

Kline's only claim of tort liability is for breach of a duty of good faith and fair dealing and for breach of a fiduciary duty. As for her claim of breach of a duty of good faith and fair dealing, Kline alleged a breach based solely on the fact that the parties' agreement provided that the parties were to treat each other "fairly and in good faith." "If an action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is in substance an action on the contract, whatever may be the form of the pleading." *International Printing Pressmen and Assistants' Union Am. v. Smith*, 145 Tex. 399, 198 S.W.2d 729, 735 (1949). Here, the substance of Kline's claim is based solely on the alleged breach of the Second Attorneys' Agreement. Because her cause of action for breach of a duty of good faith and fair dealing is not maintainable without reference to the parties' contract, Kline failed to state a proper tort cause of action.

As the majority correctly observed, a cause of action for breach of the duty of good faith and fair dealing is generally not recognized in contract outside of the insurance context or the public sector. *See Crim Truck & Tractor v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992); *Houston Cable TV, Inc. v. Inwood West Civic Assoc.*, 839 S.W.2d 497, 503 (Tex. App.--Houston [14th Dist.] 1992), writ dism'd, 860 S.W.2d 22 (Tex. 1993). Aside from those circumstances, an allegation of breach of a duty of good faith and fair dealing gives rise only to a cause of action for breach of contract. *See Crim Truck*, 823 S.W.2d at 595, n. 5. As previously noted, Kline's claim of a breach of good faith and fair dealing is nothing more than a claim for breach of contract. As a result,

Kline could not recover punitive damages as a matter of law on that basis.

The same is true of her claim of a breach of fiduciary duty. Similar to her other tort claim, Kline alleges a fiduciary duty on the part of O'Quinn and Pearson simply because the parties agreement provided: (1) that Kline's share of fees would be paid from settlement proceeds deposited in O'Quinn's client trust account; and, (2) that Kline would be an "associate" of O'Quinn's law firm for purpose of handling cases covered by the agreement.

A fiduciary duty arises from the relationship of the parties and not just from the contract. *See Crim Truck*, 823 S.W.2d at 594-97. In the instant case, Kline does not allege the existence of a confidential relationship which would give rise to a fiduciary duty outside of the parties' contract. *See Crim Truck*, 823 S.W.2d at 594-97; *see also American Medical Int'l, Inc. v. Giurintano*, 821 S.W.2d 331, 339 (Tex. App.--Houston [14th Dist.] 1991, no writ) (opinion on motion for rehearing). Thus, Kline failed as a matter of law to state a cause of action for breach of fiduciary duty and was barred from recovering punitive damages on that ground.

Similarly, Kline's only claim of injury was economic and to the subject matter of the contract, i.e., her share of contingent attorneys' fees owed under the Second Attorneys' Agreement. Economic injury to the subject matter of the contract will not automatically preclude a punitive damages award especially where there is an allegation of fraud. *See Houston Cable*, 839 S.W.2d at 503; *see also Schindler v. Austwell Farmers Co-Op*, 829 S.W.2d 283, 289-91 (Tex. App.--Corpus Christi 1992) (opinion on motion for rehearing), *aff'd as modf'd*, 841 S.W.2d 853 (Tex. 1992).

As previously noted, Kline's Original Petition did not allege fraud or intentional conduct of any kind (i.e., malice or conscious indifference) nor did it specify punitive damages.

Her petition requested actual damages, interest, attorney's fees, declaratory relief, and "such other and further relief, whether at law or in equity, whether general or special, to which she may show herself to be entitled."

It is well-settled that a pleading is sufficient only if it gives an opposing party fair and adequate notice of the claims at issue. *See Garvey v. Vawter*, 795 S.W.2d 741, 742 (Tex. 1990) (per curiam). A general prayer for relief cannot enlarge a pleading to the extent that it embraces an entirely different cause of action for which fair notice does not exist. *Stoner v. Thompson*, 578 S.W.2d 679, 684 (Tex. 1979). Only the relief consistent with the theory of the claim reflected in the petition may be granted under a general prayer. *Kissman v. Bendix Home Sys.*, 587 S.W.2d 675, 677 (Tex. 1979). The only viable theory of recovery alleged in Kline's Original Petition was for breach of contract. The general prayer contained therein cannot be read to provide relief not pled. Thus, Kline's Original Petition not only failed to state a claim upon which punitive damages could have been awarded, but also did not give O'Quinn fair and adequate notice that punitive damages could have been awarded by the arbitrators.[2]

I recognize that every reasonable presumption is indulged to uphold arbitration proceedings. *Riha v. Smulcer*, 843 S.W.2d 289, 292 (Tex. App.--Houston [14th Dist.] 1992, writ denied); *Massey v. Galvan*, 822 S.W.2d 309, 316 (Tex. App.--Houston [14th Dist.] 1992, writ denied). However, in view of the fact that Kline's Original Petition was intended to define the scope of the arbitration under the parties' agreement and the fact that this pleading did not allege facts which would support an award of punitive damages, I would hold that the trial court correctly determined that the arbitrators rendered an

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[2] Similar to her petition, Kline's post-evidentiary brief filed in the arbitration requested punitive damages based solely on the breach of the parties' agreement.

award on a matter not submitted to them and that the trial court properly struck the punitive damages award against O'Quinn.

I would also note that such a holding is compelled by the fact that this court is without a complete record. The record before this court does not include a transcription of the arbitration proceeding. The majority, citing *House Grain Co. v. Obst*, 658 S.W.2d 903, 906 (Tex. App.--Corpus Christi 1983, writ ref'd n.r.e.), holds that without a transcription of the arbitration proceeding, the court must presume adequate evidence to support the award. The case relied upon in *House Grain* for the aforementioned proposition, *City of San Antonio v. McKenzie Constr.*, 150 S.W.2d 989, 996 (Tex. 1941), says nothing of the kind, but merely recites the general rule requiring that all reasonable presumptions be indulged in favor of the award.

In the absence of a complete record, we must presume that evidence before the trial court supported its judgment. *Beck & Masten Pontiac-GMC v. Harris County Appraisal Dist.*, 830 S.W.2d 291, 295 (Tex. App.--Houston [14th Dist.] 1992, writ denied) (*citing* TEX. R. APP. P. 50(d)). While Section 23 of the Commercial Arbitration Rules of the AAA does not place the burden on any party to request a "stenographic record" of the arbitration proceedings, the rules of appellate procedure clearly place the burden on the appellant "to see that a sufficient record is presented to show error requiring reversal." TEX. R. APP. P. 52(d); COLUMBIA UNIVERSITY, *supra* at 143. Because Kline did not bring forth a complete record on appeal, this court must presume the evidence before the trial court supported its judgment. *See Beck & Masten*, 830 S.W.2d at 295.

Accordingly, I would overrule Kline's first point of error and affirm the judgment of the trial court.

/s/ George T. Ellis
Justice

Judgment Rendered and Majority and Dissenting Opinions filed March 24, 1994.

Panel Consists of Justices Murphy, Ellis and J. Smith.*

Publish - TEX. R. APP. P. 90.

* Justice Smith sitting by assignment of the Texas Supreme Court.

APPENDIX C

Motions for Rehearing Overruled and
Supplemental Opinion filed May 12, 1994.

In The
Fourteenth Court of Appeals

NO. A14-93-00187-CV

DONNA C. KLINE, Appellant

V.

JOHN M. O'QUINN, THOMAS J. PEARSON,
BANK ONE, TEXAS, N.A., Appellees

On Appeal from the 289th District Court
Harris County, Texas
Trial Court Cause No. 91-09787

OPINION ON MOTIONS FOR REHEARING

In her motion for rehearing, Kline requests interest on the $50,000.00 punitive damages award in accordance with the arbitrators' ruling. We find Kline's request to be meritorious. It is hereby ordered that the trial court's judgment be modified to award Kline interest on the $50,000.00 in punitive damages at the rate of ten percent (10%) per annum commencing from June 15, 1992, until paid. Kline's motion for rehearing is in all other respects overruled.

In his motion for rehearing, O'Quinn contends that he did not waive constitutional arguments in support of vacating or modifying the arbitrator's punitive damages award. Although O'Quinn does not dispute that he failed to raise constitutional grounds in the trial court, he contends that, as the appellee, he is under no obligation to argue every alternative theory in support of the trial court's judgment. *See Williams v. Khalaf,* 802 S.W.2d 651, 658 (Tex. 1990).

While O'Quinn is before this court in the procedural posture of appellee, O'Quinn was the non-prevailing party in arbitration. As the losing party seeking to modify or vacate the arbitrators' award, O'Quinn had the burden in the trial court of bringing forth a complete record and of establishing any basis, including constitutional grounds, which would warrant vacating or modifying the arbitrators' award. *See Grissom v. Greener & Sumner Constr. Co.*, 676 S.W.2d 709, 710-11 (Tex. App.--El Paso 1984, writ ref'd n.r.e.) (appellee, as the losing party in arbitration, had the burden in the trial court of establishing facts which would warrant vacating of arbitration award); *see also Atrium Westwood VII Venture v. Barrick Westwood Limited Partnership*, 693 S.W.2d 699, 700-701 (Tex. App.--Houston [14th Dist.] 1985, no writ) (same, except appellant was the losing party in arbitration). O'Quinn did not present his constitutional arguments to the trial court and, therefore, waived those grounds for this appeal. *See Grissom*, 676 S.W.2d at 710-711; *see also Atrium Westwood*, 696 S.W.2d at 700-701; *Mullinax, Wells, Baab and Cloutman v. Sage*, 692 S.W.2d 533, 536 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (opinion on motion for rehearing) (law firm waived attorney's fees by not raising claim in the trial court during proceeding to set aside arbitration award). O'Quinn's motion for rehearing is overruled.

In accordance with our original opinion, we hereby reverse that part of the trial court's judgment, striking the arbitrators' award of $50,000.00 in punitive damages, and render judgment that Kline recover from O'Quinn $50,000.00

in punitive damages, plus interest at the rate of ten percent (10%) per annum commencing from June 15, 1992, until paid. The remainder of the trial court's judgment is affirmed.

/s/ Jackson B. Smith Jr.
Justice (retired)*

Motions for Rehearing Overruled and Supplemental Opinion filed May 12, 1994.

Panel consists of Justices Murphy, Ellis and J. Smith.*
(Justice Ellis dissents.)

Publish - TEX. R. APP. P. 90.

*Justice Smith sitting by assignment of the Texas Supreme Court.

APPENDIX D

THE SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 1, 1994

Mr. Michael A. Johnson
The Lyric Centre
440 Louisiana, Suite 2050
Houston, TX 77002

Ms. Cheryl E. Irvin
Irvin & Burnett
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Suite 2050
Houston, TX 77002

Mr. J. Clark Martin
Vinson & Elkins
1001 Fannin Street
2715 First City Tower
Houston, TX 77002-6760

Mr. Steven Borgman
Vinson & Elkins
2715 First City Tower
1001 Fannin
Houston, TX 77002-6760

Mr. Thomas J. Pearson
6100 Hillcroft
Suite 500
Houston, TX 77081-1006

Mr. Norman Riedmueller
12 Greenway Plaza,
Suite 909
Houston, TX 77046-1202

Mr. Michael A. Pullara
1111 Hermann Drive, Suite 25A
Houston, TX 77004

RE: Case No. 94-0780

Style: JOHN M. O'QUINN
v. DONNA C. KLINE

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

BY: /S/ MIA ZIERLEIN
Mia Zierlein, Deputy Clerk

APPENDIX E

THE SUPREME COURT OF TEXAS
P. O. BOX 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 12, 1995

Mr. Michael A. Johnson
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Mr. Norman Riedmueller
12 Greenway Plaza, Ste 909
Houston, TX 77046-1202

Mr. Michael A. Pullara
1111 Hermann Drive, Suite 25A
Houston, TX 77004

RE: Case Number: 94-0780

Style: JOHN M. O'QUINN
v. DONNA C. KLINE

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

BY:/S/ MICHAEL C. MURPHEY
Michael C. Murphey, Deputy Clerk

APPENDIX F

NO. 91-009787

Donna C. Kline	§	In the District Court of
	§	
VS.	§	
	§	Harris County, Texas
John M. O'Quinn,	§	
Thomas J. Pearson, and	§	
BankOne, N.A.	§	280th Judicial District

FINAL JUDGMENT CORRECTING, MODIFYING AND CONFIRMING AWARD OF ARBITRATORS AS AMONG DONNA C. KLINE, JOHN M. O'QUINN AND THOMAS J. PEARSON, AND TAKE NOTHING JUDGMENT AS BETWEEN DONNA C. KLINE AND BANKONE, N.A.

BE IT REMEMBERED that this Cause was initiated by Donna C. Kline against Thomas J. Pearson, John M. O'Quinn, and BankOne, N.A. The disputes among Donna C. Kline, Thomas J. Pearson, and John M. O'Quinn were then submitted to arbitration in Arbitration Proceeding 70-194-0030 before the American Arbitration Association. There was an Award of Arbitrators issued June 22, 1992 by the Arbitrators in Arbitration Proceeding 70-194-0030 and a subsequent instrument also entitled Award of Arbitrators was signed on August 31, 1992, September 1, 1992 and September 3, 1992 by the Arbitrators (both of which Awards are referred to herein cumulatively as the "Award of Arbitrators"). The disputes as between Donna C. Kline and BankOne, N.A. were reserved for trial in this Cause.

BE IT FURTHER REMEMBERED that on October 2, 1992 there came on for consideration by this Court John M. O'Quinn's Motion to Vacate or Alternatively Modify and

Correct Arbitration Award filed with respect to the Award of Arbitrators, Donna C. Kline's Application for Decree with respect to such Award of Arbitrators, and John M. O'Quinn's Opposition to Kline's Application for Decree. Donna C. Kline, John M O'Quinn, and Thomas J. Pearson was each represented by counsel at the Hearing. The Court considered such Motions and such Opposition, the pleadings and papers filed in this Cause, the law, and arguments of counsel. Some of such issues were re-argued and again considered by the Court on October 9, 1992, November 6, 1992, and December 18, 1992. The Court ruled as provided herein with respect to the disputes among Donna C. Kline, John M. O'Quinn, and Thomas J. Pearson, and then carried such rulings with the case pending the trial between Donna C. Kline and BankOne, N.A.

BE IT FURTHER REMEMBERED that the disputes as between Donna C. Kline and BankOne, N.A. were tried to this Court on commencing December 21, 1992. Donna C. Kline appeared personally and through her counsel. BankOne, N.A. appeared through its authorized representatives and through counsel. Donna C. Kline and BankOne, N.A. announced ready for trial and the case was tried to the Court on December 21, 22, 23 and 28, 1992. During such trial, the Court tried no disputes as among Donna C. Kline, Thomas J. Pearson, or John M. O'Quinn. As such, Thomas J. Pearson and John M. O'Quinn, and their counsel, were not allowed to participate in such trial. Thomas J. Pearson, who had appeared at counsel table, was excluded from the Courtroom as a potential witness. Counsel for John M. O'Quinn was required to sit in the gallery.

BE IT FURTHER REMEMBERED that as a result of such hearings, the Court's consideration of such Motions and such Opposition, the pleadings and papers filed in this Cause, the law, arguments of counsel, and the trial of this Cause before this Court, the Court ORDERS, ADJUDGES, and DECREES as follows:

1. The purported award of punitive damages against John M. O'Quinn by the Arbitrators must be set aside and voided because such award fails to conform either to the parties' arbitration agreement or the relief sought by Donna C. Kline in connection with her claims against John M. O'Quinn and because the Arbitrators exceeded the scope of their authority in attempting to award punitive damages against John M. O'Quinn. Accordingly, the Award of Arbitrators is corrected and modified to void and delete Paragraph 2 on Page 1 thereof which purported to require John M. O'Quinn to pay to Donna C. Kline the sum of Fifty Thousand Dollars in exemplary damages plus interest.

2. Because Thomas J. Pearson's Motion to modify the Arbitrator's Award to eliminate the award of punitive damages was not timely filed with this Court pursuant to the provisions of the Texas General Arbitration Act, such Motion is denied.

3. Because the Arbitrators exceeded their authority in attempting to provide that the sums specified therein shall be paid within thirty (30) days from the date of the Arbitrators' signature on the Award, the Award of Arbitrators is corrected and modified to delete the next to last paragraph on Page 2 thereof.

4. All other aspects of the Award of Arbitrators are confirmed in all respects.

5. As between Donna C. Kline and John M. O'Quinn, the net result of Paragraph 1 on Page 1 of the Award of Arbitrators and the first two unnumbered paragraphs on Page 2 of the Award of Arbitrators -- and the Judgment of this Court through confirmation of such portions of the Award -- is that Donna C. Kline have judgment from John M. O'Quinn and that John M. O'Quinn shall pay to Donna C. Kline the net sum of Three Hundred and Three Thousand and Eighty One Dollars and twenty eight cents ($303,081.28), which judgment

shall bear interest from the date hereof until paid at the rate of ten percent (10%) per annum.

6. As between Donna C. Kline and Thomas J. Pearson, the net result of Paragraphs 4 and 5 on Page 1 of the Award of Arbitrators -- and the Judgment of this Court through confirmation of such portions of the Award -- is that Donna C. Kline have judgment from Thomas J. Pearson and that Thomas J. Pearson shall pay to Donna C. Kline the net sum of One Hundred Fifty Six Thousand Three Hundred and Seven Dollars and nineteen cents ($156,307.19), which judgment shall bear interest from the date hereof until paid at the rate of ten percent (10%) per annum.

7. As between Thomas J. Pearson and John M. O'Quinn, pursuant to the second unnumbered paragraph on Page 2 of the Award of Arbitrators it is the Judgment of this Court, through confirmation of such portion of the Award, that John M. O'Quinn have judgment from Thomas J. Pearson and that Thomas J. Pearson shall pay to John M. O'Quinn the sum of Three Thousand One Hundred Nineteen Dollars and twenty four cents ($3,119.24), which judgment shall bear interest from the date hereof until paid at the rate of ten percent (10%) per annum.

8. Donna C. Kline is awarded the balance of One Thousand Two Hundred Sixty-One Dollars and twenty-three cents ($1,261.23) in Texas Commerce Bank Account No. 018-0070995, also known as the "Imprest Account."

9. Donna C. Kline is awarded the sum of Five Hundred Dollars ($500.00) in her client trust account.

10. Donna C. Kline shall pay to the American Arbitration Association the sum of One Hundred Fifty-Seven Dollars and sixteen cents ($157.16) for compensation still due the arbitrators and Thomas J. Pearson shall pay to the American Arbitration Association the sum of Seven Thousand

Four Hundred Fifty-Three and fifty-nine ($7,453.59) for compensation still due the arbitrators. Thomas J. Pearson shall also pay to the American Arbitration Association the sum of One Thousand Two Hundred Seventy-One Dollars and thirteen cents ($1,271.13) for that portion of its share of administrative fees and expenses still due the Association. John M. O'Quinn shall pay to the American Arbitration Association the sum of One Hundred Fifty Dollars and no cents ($150.00) for postponement fees still due to the Association.

11. Each party participating in the Arbitration Proceeding shall bear its own attorneys fees in connection with the Arbitration and the entry of this Judgment.

12. Following the trial of this Cause as between Donna C. Kline and BankOne, N.A., the court granted a directed verdict for Defendant; and the Court orders that Donna C. Kline takes nothing from BankOne, N.A.

13. All costs of Court in this Cause shall be taxed to the party incurring the same.

14. This Judgment is a Final Judgment and is in full resolution of all claims and counterclaims in issue in this Cause or which could have been placed in issue in this Cause as between Donna C. Kline, on the one hand, and John M. O'Quinn, Thomas J. Pearson, or BankOne, N.A., on the other hand. All relief on any claim or counterclaim in issue in this Cause or which could have been placed in issue in this Cause by and between Donna C. Kline, on the one hand, and John M. O'Quinn, Thomas J. Pearson, or BankOne, N.A., on the other hand, not expressly granted in this Final Judgment, is denied.

Signed at Houston, Texas, on this the 4th day of January, 1993.

/s/ Tony Lindsay
Tony Lindsay
Judge, 280th Judicial District

Approved:

Norman Riedmueller
Texas Bar No. 16904600
NORMAN RIEDMUELLER, P.C. & ASSOCIATES
12 Greenway Plaza, Suite 909
Houston, Texas 77046-1202
PHONE: 713-965-9900
FAX: 713-965-9902

ATTORNEY FOR DONNA C. KLINE

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Texas Bar No. 13090000
Steven R. Borgman
Texas Bar No. 02670300
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2715 First City Tower
1001 Fannin
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PHONE: 713-758-2490
FAX: 713-758-2346

ATTORNEYS FOR JOHN M. O'QUINN

THOMAS J. PEARSON, Pro se

Cheryl E. Irvin
Texas Bar No. 10419500
IRVIN & CLARK
The Lyric Center
440 Louisiana, Suite 2050
Houston, Texas 77002
PHONE: 713-225-1055
FAX: 713-225-1157

ATTORNEYS FOR BANKONE, N.A.

APPENDIX G

AMERICAN ARBITRATION ASSOCIATION

Commercial ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Donna C. Kline
-and-
John M. O'Quinn & Thomas J. Pearson

CASE NUMBER: 70 194 0030 91 W

AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated 1988 and 1989 and having been duly sworn and having duly heard the proofs and allegations of the parties, AWARD, as follows:

1. JOHN M. O'QUINN shall pay to DONNA C. KLINE the sum of TWO HUNDRED FORTY-NINE THOUSAND THREE HUNDRED SIXTEEN DOLLARS AND TWO CENTS ($249,316.02), plus pre-award interest of FORTY-ONE THOUSAND FIVE HUNDRED FIFTY-TWO DOLLARS AND SIXTY-SEVEN CENTS ($41,552.67), plus post-award interest at the rate of ten percent (10%) per annum on the sum of TWO HUNDRED NINETY THOUSAND EIGHT HUNDRED SIXTY-EIGHT DOLLARS AND SIXTY-NINE ($290,868.69) commencing June 15, 1992.

See page 2 for continuation of the award in this matter

2. JOHN M. O'QUINN shall pay to DONNA C. KLINE the sum of FIFTY THOUSAND DOLLARS in exemplary damages, plus interest thereon at the rate of ten percent (10%) per annum commencing on June 15, 1992.

3. DONNA C. KLINE is awarded the balance of ONE THOUSAND TWO HUNDRED SIXTY-ONE DOLLARS AND TWENTY-THREE CENTS ($1,261.23) in Texas Commerce Bank Account No. 018-0070995, also known as the "Imprest Account."

4. THOMAS J. PEARSON shall pay to DONNA C. KLINE the sum of ONE HUNDRED FIVE THOUSAND FIVE HUNDRED TWENTY-THREE DOLLARS AND TWENTY CENTS ($105,523.20), plus pre-award interest of SEVENTEEN THOUSAND FIVE HUNDRED EIGHTY-SEVEN DOLLARS AND TWENTY CENTS ($17,587.20), plus post-award interest at the rate of ten percent (10%) per annum on the sum of ONE HUNDRED TWENTY-THREE THOUSAND ONE HUNDRED TEN DOLLARS AND FORTY CENTS ($123,110.40) commencing June 15, 1992.

5. THOMAS J. PEARSON shall pay to DONNA C. KLINE the sum of TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) in exemplary damages, plus interest thereon at the rate of ten percent (10%) per annum commencing June 15, 1992.

6. DONNA C. KLINE is awarded the sum of FIVE HUNDRED DOLLARS ($500.00) in her client trust account.

7. Each party shall bear its own attorneys fees and share equally in the fees and expenses of arbitration.

8. All relief not specifically granted is hereby denied.

The compensation and expenses of the arbitrators totaling TWENTY-TWO THOUSAND THREE HUNDRED SIXTY DOLLARS AND SEVENTY-FIVE CENTS ($22,360.75) shall be borne equally by the parties. Therefore, DONNA C. KLINE shall pay to JOHN M. O'QUINN the sum of ONE THOUSAND FORTY-SIX DOLLARS AND FORTY-TWO CENTS ($1,046.42). DONNA C. KLINE shall pay to the American Arbitration Association the sum of ONE HUNDRED FIFTY-SEVEN DOLLARS AND SIXTEEN CENTS ($157.16) for compensation still due the arbitrators and THOMAS J. PEARSON shall pay to the American Arbitration Association the sum of SEVEN THOUSAND FOUR HUNDRED FIFTY-THREE AND FIFTY-NINE ($7,453.59) for compensation still due the arbitrators.

The administrative fees and expenses of the American Arbitration Association totaling THIRTEEN THOUSAND ONE HUNDRED SEVENTY-ONE DOLLARS AND THIRTEEN CENTS ($13,171.13) shall be borne equally by the parties, and postponement fees shall be borne by the party requesting same. Therefore, DONNA C. KLINE shall pay to JOHN M. O'QUINN the sum of TWO THOUSAND EIGHT HUNDRED FORTY DOLLARS AND THIRTY-EIGHT CENTS ($2,840.38) and THOMAS J. PEARSON shall pay to JOHN M. O'QUINN the sum of THREE THOUSAND ONE HUNDRED NINETEEN DOLLARS AND TWENTY-FOUR CENTS ($3,119.24) for that portion of their share of administrative fees and expenses previously advanced by JOHN M. O'QUINN to the Association. THOMAS J. PEARSON shall pay to the American Arbitration Association the sum of ONE THOUSAND TWO HUNDRED SEVENTY-ONE DOLLARS AND THIRTEEN CENTS ($1,271.13) for that portion of its share of administrative fees and expenses still due

the Association. JOHN M. O'QUINN shall pay to the American Arbitration Association the sum of ONE HUNDRED FIFTY DOLLARS AND NO CENTS ($150.00) for postponement fees still due to the Association.

The above sums shall be paid within thirty (30) days from the date of the arbitrators' signature on this Award.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

SIGNED: /s/ Dermot Rigg DATED: June 19, 1992
Dermot Rigg - Chairman

SIGNED: /s/ James B. Gambrell DATED: June 22, 1992
James B. Gambrell - Arbitrator

SIGNED: /s/ Wendell S. Loomis DATED: June 18, 1992
Wendell S. Loomis - Arbitrator

State of

} SS:

County of

On this day of , 19 , before me personally came and appeared , to me known and to me known to be the individual(s) described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION

Commercial ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Donna C. Kline
-and-
John M. O'Quinn & Thomas J. Pearson

CASE NUMBER: 70 194 0030 91 W

AWARD OF ARBITRATOR(S)

WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated 1988 and 1989, and having been duly sworn and having duly heard the proofs and allegations of the parties, and previously having rendered an Award dated June 22, 1992, and Steven R. Borgman and J. Clark Martin on behalf of John M. O'Quinn having requested a modification by pleadings dated July 13, 1992 and August 21, 1992, respectively, and Norman Riedmueller on behalf of Donna C. Kline having responded by pleadings dated July 14, 1992 and August 5, 1992, and August 27, 1992, do hereby, DECIDE, as follows:

The Motion to Partially Modify and Vacate Arbitration Award is hereby DENIED.

This Award is in full settlement of all claims and counterclaims submitted to this arbitration.

In all other respects, our Award dated June 22, 1992 (the date of the final arbitrator's signature on such) is reaffirmed and remains in full force and effect.

SIGNED: /s/ Dermot Rigg DATED: 8/31/92
Dermot Rigg, Esq. - Chairman

SIGNED: /s/ James B. Gambrell DATED: 9/3/92
James B. Gambrell, Esq. - Arbitrator

SIGNED: /s/ Wendell S. Loomis DATED: 9/1/92
Wendell S. Loomis, Esq. - Arbitrator

STATE OF

} SS:

COUNTY OF

On this day of , 19 , before me personally came and appeared

to me known and to me known to be the individual(s) described in and who executed the foregoing instrument, and he acknowledged to me that he executed the same.

APPENDIX I

AMERICAN ARBITRATION ASSOCIATION

MEDIATION Please consult the Commercial Mediation Rules regarding mediation procedures. If you want the AAA to contact the other party and attempt to arrange a mediation, please check this box. ☐

COMMERCIAL ARBITRATION RULES
DEMAND FOR ARBITRATION

DATE: March 8, 1991

TO: Name John M. O'Quinn (O'Quinn) Thomas J. Pearson (Pearson)
(of the party upon whom the demand is made)

Address 440 Louisiana, Ste 2300 3900 Two Houston Center
City and State Houston, TX 77002 ZIP Houston, TX 77010
Telephone (713) (O'Quinn) 223-1000; (Pearson) 951-2386
Fax (O'Quinn) 222-6903; (Pearson) 759-1325

Name of Representative None now known (if known)
Representative's Address _____
City and State _____ ZIP Code _____

Telephone ( ) _____ Fax _____

The named claimant, a party to an arbitration agreement contained in a written contract, dated 1988 and 1989, providing for arbitration under the Commercial Arbitration Rules, hereby demands arbitration thereunder.

(Attach the arbitration clause or quote it hereunder.)
See Attachments I and II.

NATURE OF DISPUTE: Disagreement among attorneys over contingent fee recoveries.

CLAIM OR RELIEF SOUGHT (amount, if any): Unable to be determined without discovery from Respondents.

TYPE OF BUSINESS: Claimant Attorney Respond s Attorneys
HEARING LOCALE REQUESTED: Houston, TX
(City and State)

You are hereby notified that copies of our arbitration agreement and of this demand are being filed with the American Arbitration Association at its Houston, TX office, with the request that it commence the administration of the arbitration. Under the rules, you may file an answering statement after notice from the administrator.

Signed */s/* Norman Riedmueller Title Attorney
(may be signed by a representative)

Name of Claimant	Donna C. Kline
Address (to be used in connection with this case)	
City and State	Houston, TX ZIP Code 77002
Telephone	(713) 529-5922 Fax Same
Name of Representative	Norman Riedmueller
Representative's Address	12 Greenway Plaza, Suite 909
City and State	Houston, TX ZIP Code 77046
Telephone	(713) 965-9900 Fax (713) 965-9902

To institute proceedings, please send three copies of this demand with the administrative fee, as provided for in the rules, to the AAA. Send the original demand to the respondent.

8. BINDING ARBITRATION - In the event that a dispute arises among the Parties hereto, the Parties covenant to endeavor in good faith to resolve said dispute amicably. In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The expenses of arbitration shall be shared equally among or between the arbitrating parties but each party shall be responsible for the fees of its own counsel. Said arbitration shall take place within thirty (30) days of request by any party, unless any party to the arbitration shall be in trial at that time in which case it shall take place within thirty (30) days after such trial is concluded.

ATTACHMENT I

7. Binding Arbitration - In the event that a dispute arises among the Parties hereto, the Parties covenant to endeavor in good faith to resolve said dispute amicably. In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof. The expenses of arbitration shall be shared equally among or between the arbitrating parties but each party shall be responsible for the fees of its own counsel. Said arbitration shall take place within thirty (30) days of request by any party, unless any party to the arbitration shall be in trial at that time in which case it shall take place within thirty (30) days after such trial is concluded.

ATTACHMENT II

APPENDIX J

NORMAN RIEDMUELLER, P.C. & ASSOCIATES
Attorneys at Law
12 Greenway Plaza, Suite 909
Houston, TX 77046
---
(713) 965-9900
Telecopier: (713) 965-9902

May 28, 1991

VIA HAND DELIVERY

Ms. Tamme S. Wilkes, Administrator
American Arbitration Association
1317 First City Tower
1001 Fannin
Houston, Texas 77002-6701

Re: 70 194 0030 91 W
Donna C. Kline v. John M. O'Quinn and Thomas J. Pearson
Houston, Texas

Dear Ms. Wilkes:

Enclosed with this letter you should find our "List For Selection of Arbitrator" with some names stricken and the rest numbered in order of our preference. Also enclosed you should find a copy of our original court pleading. I am enclosing this pleading because it states Ms. Kline's position on the matters in controversy more clearly than the papers previously submitted to you. Please make the pleading available to the arbitrators when chosen.

As detailed in the enclosed pleading, Ms. Kline believes she is entitled to an accounting with regard to the collection and distribution of the proceeds of settlement of various lawsuits. Presently, Ms. Kline is completely uninformed as to the amounts received in settlement of some of the suits and has only rumor to rely upon with regard to some of the others.

Please provide this letter to the arbitrators so that they will understand the problem we are having. It is impossible for Ms. Kline to state the amount of her claim because she has been shouldered out with regard to the fees. We can think of two ways to address this situation:

kline/wilkes.ltr

Ms. Tamme S. Wilkes
May 28, 1991
Page 2

(a) the arbitration panel can order (or provide for discovery leading to) an accounting of the money; or

(b) the arbitration can proceed in stages, with the first stage being a determination of Ms. Kline's right to an accounting and the second stage being the determination of Ms. Kline's right to a share of the money.

Ms. Kline has made repeated requests to the adverse parties to provide her with information regarding the settlements in the underlying lawsuits. These have been ignored in the case of Mr. O'Quinn. They have received lip service only in the case of Mr. Pearson.

Until the facts regarding the settlements are shared with Ms. Kline, she is unable to state the full amount of her claim

and manifestly unable to proceed to a final hearing on the determination of her rights.

With regard to scheduling, please be advised that Ms. Kline will be out of the country from June 12, 1991, until July 1, 1991. I will be out of the state from June 19, 1991, to July 1, 1991.

Please call these matters to the attention of the arbitrators at your first convenience.

Yours very truly,

/s/ Norman Riedmueller

Norman Riedmueller

NR/mr
Enclosure

NO. 91-009787

Donna C. Kline Plaintiff,	§	In the District Court of
v.	§	Harris County, Texas
John M. O'Quinn, Thomas J. Pearson, and Bank One, Defendants,	§	280th Judicial District

PLAINTIFF'S ORIGINAL PETITION

COMES NOW Plaintiff Donna C. Kline ("MS. KLINE") complaining of Defendants John M. O'Quinn ("MR. O'QUINN"), Thomas J. Pearson ("MR. PEARSON") and Bank One, formerly known as MBank Houston, National Association (the "BANK"), and would respectfully show:

NATURE OF ACTION

1. This is basically a suit to enforce agreements among attorneys and a bank regarding the division of contingent fee recoveries in a variety of lawsuits. MS. KLINE has been and is being short changed or left out altogether as certain of the fees are actually recovered.

PARTIES

2. Plaintiff MS. KLINE is an individual resident of this County and State.

3. Defendants MR. O'QUINN and MR. PEARSON are individual residents of this County and State who may be served with original process herein at their respective offices as shown below:

Mr. John M. O'Quinn
O'Quinn, Kerensky & McAninch
440 Louisiana, Suite 2300
Houston, Texas 77002

Mr. Thomas J.Pearson
c/o Miller, Bristow & Brown
3900 Two Houston Center
Houston, Texas 77010

4. Defendant Bank One is a national banking association which may be served with original process herein by serving any of its officers at 910 Travis, Houston, TX 77002.

JURISDICTION AND VENUE

5. This is a case within this Court's general jurisdiction. The parties reside within this County and Plaintiff's claims arose at least in part within this County.

BACKGROUND FACTS

6. In 1988, MS. KLINE, MR. O'QUINN and MR. PEARSON made a written Agreement regarding work they would do on certain specified claims and how the fees, if any, recovered thereby would be divided. A copy of that Agreement ("the First Attorneys Agreement") is attached to this Petition as Exhibit A hereto and fully incorporated herein by this reference.

7. While the First Attorneys Agreement was in effect, MR PEARSON became indebted to MS. KLINE in at least the amount of Sixteen Thousand Five Hundred Dollars ($16,500) due to expenses, advances and the like. MR. PEARSON agreed to repay this sum at least.

8. In 1989, for various reasons, the First Attorneys Agreement was superseded by two new written Agreements. One of these two new Agreements was among only MS. KLINE, MR. O'QUINN and MR. PEARSON ("the Second Attorneys Agreement"). A copy of it is attached hereto as Exhibit B and fully incorporated herein by this reference. The other of the two agreements was among MS. KLINE, MR.

O'QUINN, MR. PEARSON and the BANK ("the Bank Agreement"). A copy of it is attached hereto as Exhibit C and fully incorporated herein by this reference. It affirmed MR. PEARSON's prior debt to MS. KLINE of at least $16,500.

9. The Second Attorneys Agreement and the Bank Agreement (together, "the 1989 Agreements") are binding on the parties thereto and enforceable by MS. KLINE according to their terms. Alternatively, if the 1989 Agreements are for any reason not enforceable by MS. KLINE, the First Attorneys Agreement is binding on the parties and enforceable by MS. KLINE according to its terms. Further alternatively, if all the referenced Agreements are for any reason not enforceable by MS. KLINE, she is entitled to recover in *quantum meruit*.

10. The parties to the referenced Agreements were in a special relationship with [each] other. By virtue of such relationship and by virtue of the Agreements themselves, the parties were obligated to act in good faith toward one another and to deal fairly with one another.

11. All conditions precedent to the relief sought herein have occurred or been performed.

THE LIBERTY WASTE CASES

12. The "Liberty Waste" cases referred to in the parties' Agreements have been the subject of certain settlements. The first such settlement was achieved in early 1989. MR. O'QUINN breached his Agreements with MS. KLINE and his good faith duties to MS. KLINE by:

(a) failing to account to MS. KLINE for the division and distribution of the settlement proceeds taken in trust by him;

(b) failing to properly apply such settlement proceeds in reduction of debt owed to MR. O'QUINN;

(c) interfering with MS. KLINE's lien on MR. PEARSON's share of such settlement proceeds;

(d) attempting to induce MR. PEARSON to agree to accept a lesser share of the settlement proceeds than previously agreed upon; and

(e) disbursing settlement proceeds without the approval of MS. KLINE.

13. A second "Liberty Waste" settlement was achieved in the Spring of 1990. If MR. O'QUINN had credited to the obligations of MS. KLINE to him her share of the proceeds of the proceeds of the first and second Liberty Waste settlements, her obligations to him would have been fully satisfied. In breach of his Agreements with MS. KLINE and his good faith duties, MR. O'QUINN did the following:

(a) he failed to account to MS. KLINE for the division and distribution of the settlement proceeds taken in trust by him;

(b) he failed to properly apply such proceeds to extinguish debt owed to him;

(c) he interfered with MS. KLINE's lien on MR. PEARSON's share of such settlement proceeds;

(d) he failed to pay to MS. KLINE the balance of the settlement proceeds owed to her;

(e) he disbursed settlement proceeds without the approval of MS. KLINE.

14. A third "Liberty Waste" settlement was achieved in the Summer of 1990. In breach of his agreements with MS. KLINE and his good faith duties, MR. O'QUINN did the following:

(a) he failed to account to MS. KLINE for the division and distribution of the settlement proceeds taken in trust by him;

(b) he failed to pay to MS. KLINE her share of such proceeds;

(c) he disbursed settlement proceeds without the approval of MS. KLINE.

15. MS. KLINE is informed and believes that a fourth settlement and a fifth settlement were achieved in the "Liberty Waste" cases. By the time these occurred, relations between the parties were strained to the point where little or no information was being shared with MS. KLINE. If, as MS. KLINE believes, millions of dollars have been recovered by further Liberty Waste settlements, then MR. O'QUINN, MR. PEARSON or both have breached their Agreements with MS. KLINE and their good faith duties by:

(a) failing to account to MS. KLINE for the division and distribution of the settlement proceeds;

(b) failing to pay to MS. KLINE her share of such proceeds;

(c) disbursing settlement proceeds without the approval of MS. KLINE.

THE HELM CASE

16. After the First Attorneys Agreement was made and before the 1989 Agreements were made, a settlement was achieved of part of the "Helm" case (one of the "asbestos cases" referred to in the parties' Agreements). These proceeds were deposited in MR. PEARSON's client trust account. He has never transferred these proceeds to MR. O'QUINN's client trust account, nor accounted to MS. KLINE for her share of the recovery, nor applied it to her debt to him, nor paid her any of it. These failures were in breach of MR. PEARSON's contract and good faith duties.

17. MS. KLINE is entitled to be kept informed of the progress of the balance of the "Helm" case, but has not been. If there has been any further recover in the case, she has been deprived of her rights in that regard as well.

THE COOK AND MAYFIELD CASES

18. The "Cook" and "Mayfield" cases are two other "asbestos" cases covered by the parties' Agreements. After the First Attorneys Agreement was made and before the 1989 Agreements were made, there may have been a recovery achieved in these two cases. MS. KLINE has not been kept informed in this regard. After the 1989 Agreements were made, MS. KLINE came into possession of Five Hundred Dollars ($500) which she is holding in her client trust account with respect to these two asbestos cases. If any other party has achieved any settlement or other recovery in the "Cook" or "Mayfield" cases, MS. KLINE is entitled to an accounting of the division and distribution thereof and to her share thereof.

THE GOINGS CASE

19. In November 1990, the "Goings" case referred to in the parties' Agreements was settled. Apparently, MR. PEARSON exercised control over the settlement proceeds. He paid some money to MS. KLINE to reimburse expenses she had incurred. In violation of his contract and good faith duties, MR. PEARSON:

(a) has failed to fully account to MS. KLINE for the division and distribution of the settlement proceeds; and

(b) may have failed to pay to MS. KLINE her share thereof.

THE BANK'S ROLE

20. MS. KLINE presently has no reason to believe that the BANK has been actively responsible for the harm she has suffered. However, because the BANK is a party to the Bank Agreement and has a legal interest in the outcome of these matters, the BANK has been named a party to this case. MS. KLINE further believes that the BANK has acquiesced in distributions in derogation of her rights.

CAUSES OF ACTION

21. By virtue of the foregoing, MR. O'QUINN and MR. PEARSON are in breach of their contractual obligations to MS. KLINE. these breaches have caused her monetary loss in an amount which she is presently unable to state due to the withholding of information from her.

22. Further by virtue of the foregoing, MR. O'QUINN and MR. PEARSON have breached their tort duty of acting in good faith toward MS. KLINE and of dealing fairly with her.

23. MR. O'QUINN assumed the duties of a fiduciary by agreeing to take settlement proceeds into a client trust account and by then doing so, he breached his fiduciary duties to MS. KLINE by all of his conduct described above regarding the handling of settlement proceeds.

24. MR. PEARSON assumed the duties of a fiduciary by taking settlement proceeds into a client trust account and by later orally agreeing to hold such proceeds therein. He breached his fiduciary duties to MS. KLINE by his conduct in the handling of such proceeds.

25. MR. PEARSON has not paid the $16,500 he agreed he owes her.

26. MS. KLINE is entitled to a declaratory judgment in her favor resolving all outstanding disputes amongst the parties.

ARBITRATION

27. The First Attorneys Agreement and the Second Attorneys Agreement contain provisions requiring binding arbitration of disputes arising thereunder. MS. KLINE has invoked and again invokes such provisions as they pertain to MR. O'QUINN and MR. PEARSON.

ATTORNEYS FEES

28. MS. KLINE has been required to retain attorneys to represent her in enforcing her contract rights and in securing the declaratory relief to which she is entitled. Both at law and by virtue of express provisions in the written Agreements made the subject of this case, MS. KLINE is entitled to recover reasonable and necessary attorneys fees.

PRAYER

WHEREFORE, Plaintiff DONNA C. KLINE, prays that the Defendants be cited to appear and answer herein; that the Court order arbitration of the disputes between Plaintiff and Defendants JOHN M. O'QUINN and THOMAS J. PEARSON; that, with or without regard to any arbitration award, she receive her actual damages with pre-judgment interest, a reasonable and necessary attorneys fee award, post-judgment interest, a declaration of the relative rights and duties of the parties and such other and further relief, whether at law or in equity, whether general or special, to which she may show herself to be entitled. Plaintiff prays for general relief.

Respectfully submitted,

NORMAN RIEDMUELLER, P.C. &
ASSOCIATES

By: /s/ Norman Riedmueller (ues)
Norman Riedmueller
Texas Bar No. 16904600
12 Greenway Plaza, Suite 909
Houston, Texas 77046
(713) 965-9900
(713) 965-9902 - Telecopier

ATTORNEYS FOR PLAINTIFF
DONNA C. KLINE

APPENDIX K

NO. 14-93-00187-CV

DONNA C. KLINE,
Appellant,

vs.

JOHN M. O'QUINN
THOMAS J. PEARSON, and
BANK ONE, TEXAS, N.A.,
Appellees

IN THE COURT OF APPEALS FOR THE
FOURTEENTH DISTRICT OF TEXAS

BRIEF OF APPELLEE JOHN M. O'QUINN

J. Clark Martin
Texas Bar No. 13090000
Steven R. Borgman
Texas Bar No. 02670300
VINSON & ELKINS L.L.P.
Attorneys At Law
2715 First City Tower
1001 Fannin
Houston, Texas 77002-6760

TO THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS:

COMES NOW Appellee John M. O'Quinn ("O'Quinn") and respectfully files this his Brief of Appellee. For the reasons set forth below, O'Quinn prays that this Court **affirm** the Judgment granted below.

NAMES OF ALL PARTIES

Appellant:	Donna C. Kline
Appellant's Counsel:	Norman Riedmueller Michael Pullara
Appellee:	John M. O'Quinn
Appellee's Counsel:	J. Clark Martin Steven R. Borgman Vinson & Elkins L.L.P.
Appellee:	Thomas J. Pearson
Appellee's Counsel:	Thomas J. Pearson & Associates Pro se
Appellee:	Bank One, Texas, N.A.
Appellee's Counsel:	Cheryl E. Irvin Irvin, Clark & Burnett

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STATEMENT OF THE FACTS 3

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b. The arbitration proceeding 5

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ARGUMENT 11

I. The punitive damages issues 11

A. Arbitrators functioning pursuant to the Texas General Arbitration Act should not, in accordance with Constitutional principles and as a matter of public policy, be allowed to award punitive damages -- even if the parties attempt to specifically grant such authority to
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MR. O'QUINN'S COUNTER-POINTS OF ERROR:

1. **THE TRIAL COURT PROPERLY MODIFIED THE AWARD TO ELIMINATE THE PUNITIVE DAMAGES AWARDED AGAINST MR. O'QUINN**

2. **THE TRIAL COURT PROPERLY REFUSED TO AWARD MS. KLINE ATTORNEYS' FEES INCURRED IN CONNECTION WITH EFFORTS TO CONFIRM OR ENFORCE THE AWARD**

3. **THE TRIAL COURT PROPERLY REFUSED TO ALLOW MS. KLINE TO LITIGATE THE SINGLE ISSUE OF PUNITIVE DAMAGES AS TO MR. O'QUINN**

SUMMARY OF THE ISSUES BETWEEN MS. KLINE AND MR. O'QUINN:

Insofar as this appeal by Ms. Donna Kline pertains to Mr. O'Quinn, it presents three primary issues.

1. First, there is the issue of whether Arbitrators functioning pursuant to the Texas General Arbitration Act should, in accordance with constitutional principles or as a matter of public policy, be prohibited from awarding punitive damages; and/or, if Arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages, whether the Arbitrators in this case exceeded their Authority by attempting to award punitive damages against Mr. O'Quinn when the issue of punitive damages was not submitted to arbitration; and/or, if Arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages and if it is concluded that the issue of punitive damages against Mr. O'Quinn was submitted to arbitration, whether the Arbitrators in this case exceeded their Authority by attempting to award punitive damages against Mr. O'Quinn when Texas law does not allow the award of punitive damages in connection with Ms. Kline's claim for economic losses resulting from breach of contract. [Responsive to Ms. Kline's Point of Error No. 1]

2. Second, even though the Arbitrators' Award provided that each party shall bear his or her own attorneys fees, Ms. Kline claimed that she was entitled to a further award against Mr. O'Quinn (and also against Mr. Pearson) for attorney's fees incurred in connection with getting the *Final Judgment* signed by the Trial Court confirming the Arbitrators' Award. Ms. Kline made this claim even though it was she who prolonged the process by refusing to accept the proposed Judgment that Mr. O'Quinn agreed could be entered by the Court and even though the *Final Judgment* ultimately entered by the

Court was not favorable to Ms. Kline on the then disputed issues of punitive damages and post-Award attorney's fees. The Trial Court denied Ms. Kline's request for such post-Award attorney's fees. Ms. Kline now appeals this aspect of the Trial Court's *Final Judgment*. [Responsive to Ms. Kline's Point of Error No. 2]

3. Third, Ms. Kline argued to the Trial Court that even though Ms. Kline had obtained an Award in the Arbitration proceeding in the total amount of the economic losses she had been seeking, she should be entitled to go to trial against Bank One to obtain judgment against Bank One for the same amount of economic losses. Ms. Kline also argued that she should be allowed to a separate trial against Mr. O'Quinn for punitive damages alone and that she should have the right to a separate trial on post-Award attorneys fees. The Trial Court held that Ms. Kline was not entitled to either punitive damages from Mr. O'Quinn or post-Award attorneys fees from Mr. O'Quinn and Mr. Pearson. The Trial Court held that Ms. Kline could proceed to trial against Bank One, but that nothing would be tried as against Mr. O'Quinn or Mr. Pearson. Ms. Kline's case against Bank One went to trial on December 21, 1992. The case was tried to the Court. The Court tried no disputes as among Ms. Kline and Mr. O'Quinn. Mr. O'Quinn and undersigned counsel were not allowed to participate in such trial. Mr. O'Quinn, who was in trial in another court at the time, was excluded from the courtroom as a potential witness. Undersigned counsel for Mr. O'Quinn was required to sit in the gallery. At the conclusion of Ms. Kline's case, the Trial Court granted a directed verdict in favor of Bank One. Ms. Kline now appeals the Trial Court's decision to direct a verdict in favor of Bank One. Undersigned counsel represents only Mr. O'Quinn. Mr. Pearson represents himself *pro se*. Bank One has its own counsel. Although this Appellee's Brief discusses Ms. Kline's theories concerning her right to a trial against Mr. O'Quinn and the *res judicata* affect of the Arbitration proceeding with respect to Mr. O'Quinn, insofar as Ms. Kline's Point of Error No. 3 affects Bank One, undersigned

counsel leaves that issue to Bank One. [Responsive to Ms. Kline's Point of Error No. 3]

MR. O'QUINN'S RULE 74(f) OBJECTION TO MS. KLINE'S STATEMENT OF THE FACTS:

Pursuant to Rule 74(f) of the Texas Rules of Appellate Procedure, Mr. O'Quinn objects to Ms. Kline's Statement of the Facts and other representations of facts in the Brief of Appellant and submits the following Statement of the Facts.

STATEMENT OF THE FACTS:

Insofar as this appeal involves issues between Ms. Kline and Mr. O'Quinn, this appeal arises out the arbitration of a contract dispute among lawyers over the allocation of contingent fees from various cases.

a. The disputes between Ms. Kline and Mr. O'Quinn:

In the mid-80's, Mr. O'Quinn entered into an agreement with Mr. Don Maierson, an attorney, with respect to certain "toxic tort" cases, often referred to as the ***Liberty Waste*** cases. Under this agreement, Mr. O'Quinn was to receive 45% of any fees recovered in the ***Liberty Waste*** cases, with Mr. Maierson to use the other 55% to pay himself and the other attorneys working on the case. [SOF 582-584; P. Exhs. 3 & 4]

In early 1988, Ms. Kline and Mr. Pearson were working together on various cases, representing various clients on a contingent fee basis. [SOF 74-78 and 83-92] In that timeframe, Mr. Maierson entered into an arrangement separately with each of Ms. Kline and Mr. Pearson regarding Ms. Kline and Mr. Pearson assisting Mr. Maierson with the ***Liberty Waste*** cases. [SOF 586-587] They were to be paid out of Mr. Maierson's share of the attorneys fees ultimately recovered in connection with those cases.

Because Ms. Kline and Mr. Pearson did not have adequate resources to finance their own cases, they sought help from Mr.

O'Quinn. [SOF 587-589] On March 1, 1988, Ms. Kline and Messrs. O'Quinn and Pearson entered into an agreement by which Mr. O'Quinn would fund and assist in certain cases. [Tr. 11-20] In this agreement, Ms. Kline, Mr. Pearson, and Mr. O'Quinn restated their understanding of the apportionment of fees in the ***Liberty Waste*** cases. In addition, Mr. Pearson and Ms. Kline agreed to pay Mr. O'Quinn a specified share of any recovery they received in other cases, such as the ***Lux, Cook, Helm,*** and ***Goings*** cases. [Tr. 11-20] Pursuant to this March 1, 1988 agreement, Mr. O'Quinn advanced both Mr. Pearson and Ms. Kline substantial sums. Moreover, Mr. O'Quinn funded an account for Ms. Kline and Mr. Pearson to use to pay expenses incurred in the cases covered by the March 1, 1988 Agreement. [SOF 105-106, 587-589, P. Exh. 5]

In connection with the March 1, 1988 agreement, Mr. Pearson concealed from Mr. O'Quinn that Bank One's predecessor, MBank, had obtained a Judgment against Mr. Pearson that affected the attorney's fees that might be forthcoming in the ***Lux, Cook, Helm,*** and ***Goings*** cases. [SOF 576-578] When Mr. O'Quinn learned that MBank was a judgment creditor of Mr. Pearson, Ms. Kline, Mr. O'Quinn, and Mr. Pearson entered into an agreement with MBank to allocate Mr. Pearson's share of any attorney's fees from the cases covered by the March 1, 1988 Agreement. [SOF 576-578, Tr. 39-45, P. Exh. 8] At the same time, Ms. Kline, Mr. O'Quinn, and Mr. Pearson entered into a second agreement dated January 20, 1989 [P. Exh. 7] detailing their understanding of how the fees were to be allocated (the "Agreement"). [Tr. 21-38]

Mr. Maierson, Mr. O'Quinn, Ms. Kline and Mr. Pearson were ultimately successful in their representation of their clients in these cases. As a result of various settlements in the cases covered by the above agreements, sums were received for the clients and attorney's fees were recovered. Mr. Pearson recovered approximately $1.4 million in fees from the ***Goings*** case, but failed to pay Mr. O'Quinn the portion due him under the Agreement. [SOF 603] Ms. Kline received fees from the

Lux case and failed to pay Mr. O'Quinn the portion due him under the Agreement. [SOF 185-189, 605-606] When there were settlements in the ***Liberty Waste*** cases, Mr. Maierson refused to pay Ms. Kline because Ms. Kline had failed to carry out her responsibilities with respect to the cases. Ms. Kline asked Mr. O'Quinn to get involved and try to persuade Mr. Maierson to pay Ms. Kline. [SOF 590-592, D. Exh. 75] When Mr. Maierson still refused to pay Ms. Kline, she asked Mr. O'Quinn to pay her from his own share of the ***Liberty Waste*** fees, something Mr. O'Quinn had never agreed to do. [SOF 614-615]

In early 1991, after Mr. O'Quinn refused to comply with her demands for more money, Ms. Kline filed suit against Mr. O'Quinn, Mr. Pearson, and MBank (now Bank One, Texas, N.A.), claiming that they owed her additional attorney's fees from the settlements of certain lawsuits. [Tr. 2] As detailed in Ms. Kline's *Original Petition*, she sued Mr. O'Quinn and Mr. Pearson. Bank One was named in Ms. Kline's lawsuit, but no claim was made against Bank One. [Tr. 8] Ms. Kline alleged that Mr. O'Quinn and Mr. Pearson were in breach of their contractual obligations regarding the allocation of attorney's fees. Ms. Kline sought to recover the economic losses she claimed she sustained as a result of the breach of the Agreement by Mr. O'Quinn and Mr. Pearson. Although her lawsuit was to recover monies that she claimed she was owed under the Agreement, Ms. Kline also alleged that Mr. O'Quinn and Mr. Pearson breached an alleged tort duty of good faith and fair dealing and had assumed the duties of fiduciaries and had breached a fiduciary duty. Mr. O'Quinn answered and denied all wrongdoing. [Tr. 48]

b. The arbitration proceeding:

After filing suit, on March 8, 1991 Ms. Kline then filed a demand for arbitration with the American Arbitration Association. [P. Exh. 76] Ms. Kline's demand for arbitration described the dispute as a "disagreement among attorneys over

contingent fee recoveries." [P. Exh. 76] Ms. Kline also submitted her Original Petition to the AAA, together with an explanatory letter, which noted that the Original Petition "states Ms. Kline's position on the matters and controversy more clearly than the papers previously submitted" to the AAA. [Supp. Tr. 30-31] Neither Ms. Kline's demand for arbitration nor her Original Petition made any request for an award of punitive damages. [Tr. 2-10, Supp. Tr. 27-31] In her prayer, Ms. Kline requested only actual damages, attorney's fees, pre-judgment and post-judgment interest, and a declaration of the rights and duties of the parties with respect to each other. [Tr. 8-10] Mr. O'Quinn presented his claims for monies owed to him by Mr. Pearson and Ms. Kline. [Tr. 300-304]

Because the agreements among Ms. Kline, Mr. O'Quinn, and Mr. Pearson provided for arbitration, these three parties proceeded to arbitration before the AAA in Arbitration No. 70 194 0030 91 W. The arbitration hearing was held in May 1992. There was no transcript or other record maintained on the Arbitration Proceeding. On June 23, 1992, the arbitrators issued their "Award of Arbitrators." [Tr. 81] The Arbitrators awarded Ms. Kline all of the compensatory losses she had claimed against Mr. O'Quinn, plus pre-Award and post-Award interest. Even though not pled for by Ms. Kline, the Arbitrators stated that Mr. O'Quinn was to pay Ms. Kline $50,000 in exemplary damages. The Arbitrators stated that each party shall bear its own attorneys fees and share equally in the fees and expenses of arbitration. The Arbitrators held that "all relief not specifically granted in the Award is hereby denied" [Tr. 81] and that the "Award is in full settlement of all claims and counterclaims submitted to this Arbitration" [Tr. 82].

c. The post-Award events as between Ms. Kline and Mr. O'Quinn:

Undersigned counsel began representing Mr. O'Quinn after the Arbitrators entered their Award. Because the

Arbitrators' Award improperly purported to assess punitive damages against him, Mr. O'Quinn timely sought review of the Award by the Arbitrators pursuant to Articles 232, 237 and 238 of the Texas General Arbitration Act. [Tr. 83] The AAA initially refused to even consider the Motion. The AAA took the position that, irrespective of the Texas General Arbitration Act, an AAA Award may not be modified or vacated. The AAA stated that they would not even refer Mr. O'Quinn's Motion on the Arbitrators for their consideration, unless Ms. Kline agreed. Ms. Kline filed a Response opposing what undersigned counsel had to say.[1/] Undersigned counsel filed a Reply [P. Exh. 73] to Ms. Kline's Response pointing out to the AAA that its own Guide to Commercial Arbitration requires that the AAA follow the law and that the Texas General Arbitration Act -- which is the law -- provides for the filing of an application for the modification of an Award. The AAA ignored Mr. O'Quinn's Reply. It was only after I

1/ Ms. Kline's Response to Mr. O'Quinn's Motion is found at SOF P. Exh. 72. Ms. Kline opposed having the Arbitrators even consider Mr. O'Quinn's Motion. Ms. Kline's Response also references letters that Ms. Kline's counsel had previously sent to the AAA opposing the Arbitrators' consideration of Mr. O'Quinn's Motion.

The entire tenor and attitude of Ms. Kline's Response is important to this Court's review of the issues presented in this Appeal. This is an instrument filed by Ms. Kline with the AAA for the purpose of trying to avoid the legal issues by ridicule. Undersigned counsel had never met or even spoken with Ms. Kline or her counsel. Yet Ms. Kline engaged in the same type of personal attacks that had been directed at Mr. O'Quinn throughout the entire Arbitration proceeding and were directed at Mr. O'Quinn relentlessly in the subsequent proceedings before the Trial Court.

demanded that the issue be decided by the AAA's head office in New York that the AAA relented and forwarded Mr. O'Quinn's motion to the three Arbitrators. Given the AAA's actions, it was not surprising that the Arbitrators summarily denied Mr. O'Quinn's Motion. [Tr. 96] Indeed, as Ms. Kline's Response urged, the Arbitrators may not have even considered Mr. O'Quinn's Motion at all. [P. Exh 72, p. 3]

Mr. O'Quinn then filed with the Trial Court his Motion to Vacate, or, Alternatively, Modify and Correct the Award. [Tr. 58-72][2/] About the same time, Ms. Kline filed a motion, styled an Application for Decree, seeking to confirm the Award. [Tr. 78-80]. Mr. O'Quinn then filed an Opposition to Ms. Kline's Application for Decree [Tr. 99-108]. In this same time frame, Ms. Kline filed a First Amended Original Petition with the Trial Court. [Tr. 53-57] This pleading presented no claim against Mr. O'Quinn except to have the Arbitrators' Award confirmed (there was no claim for post-Award attorneys fees); Ms. Kline's only claim was lodged against Bank One. [Tr. 55-57] This pleading was consistent with the position initially taken by Ms. Kline before the Trial Court that the Arbitration Award is *res judicata* as to all of Ms. Kline's claims against Mr. O'Quinn arising out of this *transaction*.

On October 2, 1992, the Trial Court held a hearing regarding the issues raised by Mr. O'Quinn's Motion to Vacate, or, Alternatively, to Modify and Correct the Award, and by Ms. Kline's Application for Decree. [Tr. 274-275] At this initial hearing, the Trial Court ruled that the arbitrators exceeded their authority by ordering Mr. O'Quinn to pay punitive

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2/ The record in this Appeal is replete with many duplicate copies, some of them incomplete, of the same documents, pleadings, letters, and other exhibits filed with the Trial Court. We have tried whenever possible to refer to the most easily accessible of the various copies of the instrument in question.

damages and by ordering payment of the Award within thirty (30) days after it was signed (the Arbitrators did not give the parties time to file Motions for modification or have the courts consider the propriety of the Arbitrators' Award). [Tr. 274-275] At the conclusion of this hearing, the parties agreed to try to work out an appropriate order reflecting the Trial Court's ruling.

When the parties were unable to agree on an appropriate form of order, the Trial Court held another hearing on October 9, 1992. [Tr. 275] At this hearing, the parties addressed the various issues raised by the drafts they had exchanged. The Trial Court again ruled that the Arbitrators exceeded the scope of their authority by awarding punitive damages and by requiring payment of the award within thirty (30) days. The Trial Court also ruled that Ms. Kline was not entitled to a recovery of attorney's fees incurred in connection with her efforts to confirm the Award. [Tr. 275] It was becoming evident that the delay and the reason that Ms. Kline was incurring attorneys fees was not because Mr. O'Quinn was opposing the entry of a Judgment confirming the portions of the Arbitrators' Award that, even though Mr. O'Quinn believed them to be wrong, were at least within the scope of the issues that had been submitted to arbitration. Indeed, Mr. O'Quinn had stated that he would agree to a Judgment that confirmed the actual damages component of the Arbitrators Award and that he would pay the Judgment and not appeal it. Instead, Ms. Kline refused to accept the Trial Court's decision that the Arbitrators' attempt to award punitive damages was improper, that the Arbitrators' efforts to make the Award payable within thirty days was improper, and that Ms. Kline's efforts to recover post-Award attorney's fees was improper.

At this second hearing, the Trial Court then instructed the parties to brief the issue of what, if any, issues remained for trial with respect to Ms. Kline's claims against Mr. O'Quinn. On October 22, 1992, a letter was filed on behalf of Ms. Kline.

[Tr. 126-130] This letter asserted once again that the Award should be confirmed. Ms. Kline also took the position, however, that if the Trial Court refused to completely confirm the Award, then the Trial Court should allow Ms. Kline to proceed to trial against Mr. O'Quinn on the issue of punitive damages. [Tr. 126-130]

On October 29, 1992, Mr. O'Quinn's attorneys filed a letter stating Mr. O'Quinn's position on the issues raised by Ms. Kline. [Supp. Tr. 13-24] Mr. O'Quinn pointed out that the doctrine of *res judicata* barred the relitigation of the same factual transaction which was the subject of the arbitration proceeding and the resulting Award. Accordingly, Mr. O'Quinn's letter pointed out that there were no remaining issues for trial.[3/]

On October 30, 1992, Mr. O'Quinn filed his Motion for Judgment. [Tr. 274-276] In accordance with the Trial Court's earlier rulings, Mr. O'Quinn's Motion for Judgment sought to modify the Award to eliminate the purported award of punitive damages and to confirm the remainder of the Award as modified. On November 6, 1992, the Trial Court held a hearing on Mr. O'Quinn's Motion. At this third hearing, the Trial Court reconfirmed her prior rulings but declined to enter a Judgment incorporating her prior rulings. The Trial Court stated that there should be only one Judgment signed in this case and that such Judgment would be signed after all of the issues were resolved.

Ms. Kline has consistently admitted that she obtained an Award in the arbitration proceeding for all of the compensatory

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3/ Among others, the following materials discuss in some detail the history of this dispute after the Arbitrators entered their Award: undersigned counsel's October 29, 1992 letter to Judge Lindsay [Supp. Tr. 13-24] and *O'Quinn's Memorandum of Law* presented to the Trial Court [Supp. Tr. 65-82].

damages she claims she sustained in this *transaction*. [SOF 303-308] In spite of the *one recovery* rule, Ms. Kline argued she should be entitled to a trial against Bank One. The Trial Court held that Ms. Kline's case against Bank One could proceed to trial and that after the trial the Court would enter Judgment.

On December 18, 1992, the Trial Court held a pretrial hearing. At this pretrial hearing, the parties again addressed the issue of what, if any, issues remained for trial as between Ms. Kline and Mr. O'Quinn. [SOF PT 4-21][1] The Trial Court again ruled, as in its earlier hearings, that the portion of the Award purporting to grant punitive damages was incorrect and the Award would be modified. [SOF PT 21] The Trial Court also refused to allow Ms. Kline to recover her attorney's fees incurred in connection with confirming and enforcing the Award. [SOF PT 34] Ms. Kline then argued in the alternative that she should be entitled to a trial on the issue of punitive damages alone. [SOF PT 19-20] The Trial Court rejected this idea. [SOF PT 21]

Although the Trial Court's rulings made it clear that there were no issues remaining for trial as against Mr. O'Quinn, the Trial Court did not enter any written order. Instead, the Trial Court carried Mr. O'Quinn with the case, which proceeded to trial against Defendant Bank One on December 21, 1992. At the time of the trial, Mr. Pearson argued for the first time that the Award should be modified to eliminate the punitive damages awarded against him. The Trial Court held that Mr. Pearson failed to timely challenge the punitive damages awarded by the arbitrators to Ms. Kline from him. [SOF PT 21-32] During the trial, the Trial Court refused to allow Mr. O'Quinn's counsel to participate in the proceedings. [SOF 40-

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[1] The abbreviation PT stands for the PreTrial portion of the Statement of Facts. The record contains two volumes beginning with page 1, *i.e.*, the PreTrial volume and the first volume of the trial.

41, 569] The Trial Court ordered counsel for Mr. O'Quinn to leave counsel table and sit in the spectators' section. [SOF 40-41, 569] The Trial Court also instructed Mr. O'Quinn's counsel not to object during the trial. [SOF 40-41, 569] Even when Mr. O'Quinn was called as a witness, undersigned counsel was instructed to remain relegated to the Gallery and was not allowed to object or even ask questions. [SOF 569]. Counsel for Mr. O'Quinn, predicting that Ms. Kline was proceeding with trial as a ploy simply to try to "build a record" prejudicial to Mr. O'Quinn, objected to the Trial Court's ruling. Mr. O'Quinn's counsel continued to try to object throughout the proceeding. [SOF PT 51-52; SOF 35, 40-41, 61, 300-302, 479, 513, 569] And that is exactly what happened. Ms. Kline's "case" against Bank One was really nothing more than a relentless effort to disparage Mr. O'Quinn -- who was not allowed in the courtroom, except as a witness and whose counsel was not allowed to object or ask questions, either of Ms. Kline or Mr. O'Quinn.

At the close of Ms. Kline's case in chief on September 28, 1992, Bank One moved for a directed verdict. [SOF 654] After listening to the parties' arguments, the Trial Court granted Bank One's motion. [SOF 670-71] The Trial Court then entered its *Final Judgment* on January 4, 1993. [Tr. 379-82] Ms. Kline now appeals from the *Final Judgment*.

ARGUMENT

I. The punitive damages issues:

There are three extremely important issues presented in this Appeal with respect to the purported award of punitive damages in an arbitration award under the Texas General Arbitration Act. First, should Arbitrators functioning pursuant to the Texas General Arbitration Act, in accordance with constitutional principles or as a matter of public policy, be prohibited from awarding punitive damages -- even if the parties attempt to specifically grant such authority to the arbitrators? Second, even if arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages, may arbitrators attempt to award punitive damages when the issue of punitive damages was not expressly submitted to arbitration? Third, even if arbitrators functioning pursuant to the Texas General Arbitration Act are not prohibited constitutionally or as a matter of public policy from awarding punitive damages and even if the issue of punitive damages may be submitted to arbitration by implication, may arbitrators exceed their authority by attempting to award punitive damages when the applicable law does not allow the award of punitive damages? To the best of the knowledge of undersigned counsel, the few Texas decisions dealing with the issue of whether arbitrators may award punitive damages, *i.e.*, ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ); ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.), did not deal with the issues raised in this case.

A. Arbitrators functioning pursuant to the Texas General Arbitration Act should not, in accordance with the Constitution and as a matter of public policy, be allowed to award punitive damages -- even if the parties attempt

to specifically grant such authority to the arbitrators:

There are two fundamental reasons why arbitrators should not be allowed to award punitive damages in arbitration proceedings conducted pursuant to the Texas General Arbitration Act, *i.e.*, (1) arbitration proceedings lack the substantive and procedural safeguards required by the Due Process Clause of the United States Constitution and the Due Course of Law Clause of the Texas Constitution, and (2) allowing Arbitrators to award punitive damages is contrary to the public policies of this State.

B. Because arbitration proceedings do not comply with constitutional principles applicable to the award of punitive damages, arbitrators should not, as a matter of law, be permitted to award punitive damages, even if the parties have expressly or impliedly attempted to bestow that authority upon the Arbitrators:

The concept of punitive damages has its roots in the English common law and was recognized in early American jurisprudence. Over the past two centuries, courts in our country and in the State of Texas have summarily found that punitive damage awards are constitutional. It was only recently that the United States Supreme Court began examining the constitutionality of punitive damage awards in the light of Due Process requirements -- both procedural and substantive -- of the Fourteenth Amendment to the United States Constitution. These decisions by the Supreme Court are extremely important to this Appeal because Due Process of law applies to arbitration proceedings as well as to trial by a Court or Jury; the Parties do not waive their right to Due Process of law simply by agreeing that their disputes will be submitted to arbitration.

In ***Pacific Mutual Life Ins. Co. v. Haslip***, 499 U.S. 1, 111 S. Ct. 1032 (1991), the Supreme Court held that the common law method for assessing punitive damages is not so inherently unfair as to deny Due Process and to be *per se* unconstitutional. The Court went on to hold, however, that this is not the end of the matter. The Court held that neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack. ***Id.*** at 1043.

The Court held that one must concede that unlimited Jury discretion -- or unlimited judicial discretion for that matter -- in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. ***Id.*** at 1043. The Court held that it need not, and indeed, cannot draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. The Court said it could, however, say with certainty that general concerns of reasonableness and adequate guidance from the trial court when a case is tried to a Jury properly enter into the constitutional calculus. ***Id.*** at 1043. With those concerns in mind, the Supreme Court reviewed the constitutionality of the punitive damages awarded in the ***Haslip*** case.

The Supreme Court in ***Haslip*** indicated that the Jury's discretion with respect to punitive damages is constitutional only when a trial court gives the Jury reasonable and adequate guidance in making such awards. The Supreme Court noted that under Alabama law, as under the law of most states, punitive damages are imposed for purposes of retribution and deterrence, not to compensate the plaintiff for any injury. The Court observed that the instructions in ***Haslip*** informed the Jury that its discretion should be guided by this purpose. ***Id.*** at 1044.

In addition, the Supreme Court in ***Haslip*** indicated that punitive damages are constitutional only when the instructions given to the Jury describe the standards to be used by the Jury

in determining whether to impose such awards. Although Juries are given significant discretion in the determination of punitive damages, that discretion is not unlimited. In ***Haslip***, the Court found that the Jury's discretion was confined by appropriate instructions to deterrence and retribution and the state policy concerns sought to be advanced. ***Id.*** at 1044. The Court found that the Jury was instructed that if punitive damages were to be awarded, the Jury "must take into consideration the character and degree of the wrong as shown by the evidence and necessity of preventing similar wrong." ***Id.*** at 1044.

The Supreme Court in ***Haslip*** held that the discretion vested in the Jury under the traditional common law rules for awarding punitive damages may also be justified as constitutional by the existence of post-trial procedures for scrutinizing punitive damage awards. ***Id.*** at 1044. In ***Haslip***, the Court indicated that the procedures established by the Alabama courts ensured meaningful and adequate review by the trial court whenever a Jury fixed the amount of punitive damages. The Court noted that the Supreme Court of Alabama had established post-trial procedures for scrutinizing punitive awards. Under this procedure, Alabama trial courts are to reflect in the record the reasons for interfering with a Jury verdict, or refusing to interfere with a Jury verdict, on grounds of excessiveness of the damages. Among the factors deemed appropriate for an Alabama trial court's consideration are: (1) the culpability of the defendant's conduct, (2) the desirability of discouraging others from similar conduct, (3) the impact upon the parties, and (4) other factors, such as the impact on innocent third parties. ***Id.*** at 1044. The United States Supreme Court held that this test ensures meaningful and adequate review by the Trial Court whenever a Jury has fixed the punitive damages. ***Id.*** at 1044.

The United States Supreme Court went on to state that the procedures established by the Alabama Supreme Court provide still an additional check on the Jury's or trial court's

discretion in awarding punitive damages. *Id.* at 1045. Under these Alabama procedures, the reviewing court first undertakes a comparative analysis and then it applies detailed substantive standards the Alabama Supreme Court has developed for evaluating punitive awards. In so doing, it makes its review to ensure that the award does not exceed an amount that will accomplish society's goal of punishing and deterrence. *Id.* at 1045. The Court noted that this appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition. The United States Supreme Court noted that the Supreme Court of Alabama has elaborated and refined the criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution. Specifically, the Alabama Supreme Court has announced that the following factors may be taken into consideration in determining whether the award was excessive or inadequate: (a) whether there is a reasonable relationship between punitive damages awarded and the harm likely to result from the defendant's conduct, as well as the harm that has actually occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the financial position of the defendant; (e) all costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation. *Id.* at 1045.

The United States Supreme Court concluded that the application of these standards imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages. The Supreme Court held that these standards have real effect when applied by the Alabama Supreme Court to jury awards. The Supreme Court

noted that these standards have resulted in the reduction of punitive awards in Alabama and that they provide for a rational relationship in determining whether a particular award is greater than necessary to punish and deter. 111 S.Ct. 1045-46.

In ***TXO Production Corp. v. Alliance Resources Corp.***, ___ U.S. ___, 113 S. Ct. 2711 (June 25, 1993), the United States Supreme Court again reviewed the limits imposed by the Due Process Clause of the Fourteenth Amendment upon the award of punitive damages. The Court considered the arguments of each of the adversaries and rejected such arguments. The Court turned again to what it said two Terms earlier in ***Haslip***, "We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that a general concern of reasonableness properly enters into the constitutional calculus." ***Id.*** at 2720.

With this concern for reasonableness in mind, the Supreme Court turned to the argument that the punitive damages awarded in the case were so grossly excessive as to violate substantive Due Process. The Supreme Court concluded that because West Virginia law requires as a matter of fundamental fairness that punitive damages bear a reasonable relationship to compensatory damages or the magnitude of the potential harm that defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as to the possible harm to the other victims that might have resulted if similar future behavior were not deterred, there was sufficient concern by the West Virginia trial courts with the reasonableness of the award such that the award did not violate the substantive component of the Due Process Clause. ***Id.*** at 2720-721.

Turning to the procedural component of the due process clause, the Court indicated that the inquiry could include whether the punitive damages award is a result of a fundamentally unfair procedure because the Jury was not adequately

instructed, whether the award was adequately reviewed by the trial or appellate courts, and whether the defendant had no advance notice that the Jury might be allowed to return such a large award or to rely on potential harm as a basis for its calculation. The Court declined to address the first argument as it was not argued or passed on below. The Court concluded that in fact the Jury's award was adequately reviewed by the trial court and the appellate court and that defendant had notice under prior law that punitive damages could be awarded under the circumstances of the case. Thus, the United States Supreme Court found no procedural violation of Due Process as a result of the procedures used in West Virginia for the awarding of punitive damages. *Id.* at 2720-724.

The Texas Constitution contains its own Due Process Clause. TEX. CONST. ART I, § 19. In ***Prudential Ins. Co. of America v. Jefferson Associates, Ltd.***, 839 S.W.2d 866, 876-77 (Tex. App. -- Austin 1992, writ granted), the Court of Appeals for Austin held that a Jury's award of punitive damages did not violate the Due Process Clause of the United States Constitution or the Due Process Clause of the Texas Constitution (although the Texas Constitution uses the term "Due Course of Law") because many of the judicial safeguards relied upon in ***Haslip*** are applicable in the Texas state courts. The Court of Appeals noted that the opportunity for review by a trial court is available by both the trial court and the appellate courts. This review process includes the power of granting a remittitur. ***Id.*** at 877. With respect to the power of remittitur as applied to the Jury's award of punitive damages, the Court of Appeals held that it was obligated under ***Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981), to assess each of the five factors specified in ***Kraus*** in the light of the facts and circumstances of the particular case. ***Prudential Ins.***, 839 S.W.2d at 878. Under the facts of the ***Prudential*** case, the Court of Appeals concluded, based upon a review of all of the evidence in the record in view of the ***Kraus*** factors, as well as the reasonableness of the ratio of exemplary damages to actual damages, that the trial court did not err in failing to order a remittitur.

Id. at 879. The Court of Appeals also noted that the gross negligence standard upon which Texas allows exemplary damages is not unduly vague and that such standard satisfies the Due Process safeguards guaranteed by the Federal and State Constitutions. The Court of Appeals concluded that adequate procedural safeguards are provided by the normal Jury trial, trial court review, and appellate review process to satisfy both Federal and State Constitutional due process concerns with respect to the Jury's award of punitive damages.

Unlike the normal judicial process in which punitive damages are awarded, the reasonable substantive and procedural safeguards required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law provision of the Texas Constitution are not met by the process by which punitive damages are awarded by arbitrators.

There is no procedure whereby the arbitrators are provided, either by the Trial Court or the American Arbitration Association or some other supervising organization, instructions that articulate the purposes of punitive damages, *i.e.*, to punish and to deter the defendant, and when and under what circumstances the law allows the award of punitive damages, *e.g.*, punitive damages may not be awarded for breach of contract.

There is no procedure for controlling and limiting the evidence submitted to the Arbitrators and the statements made by the parties and their advocates to the Arbitrators. Virtually anything can be done or said during an arbitration hearing -- and apparently was in this case. Arbitrators allow almost all documents and testimony into evidence. The rules of evidence are rarely adhered to; frequently, attorneys for the parties are admonished to make no objections. Emotional and prejudicial testimony that would never be admitted into evidence by a trial court in a jury trial will usually be considered by arbitrators. There is often no transcript and thus there is no mechanism for

the trial court or appellate courts to determine what evidence was considered by the arbitrators.

There is no procedure applicable to arbitration for the trial court or the appellate courts to review the testimony and documents considered by the arbitrators or the basis on which the arbitrators made their award of punitive damages. It is only a matter of good fortune that in this case we can determine from Ms. Kline's Demand For Arbitration, the pleadings she submitted to the Arbitrators, the damages she claimed, and the Arbitrators' Award, that the Arbitrators exceeded their authority by purporting to award punitive damages when there was no basis in the law.

There is no procedure for the trial court in connection with the confirming of an arbitrators' award, or the appellate courts in reviewing the arbitration proceeding, to determine whether the award of punitive damages by the arbitrators is excessive taking into account the factors articulated by the Texas Supreme Court: (i) whether the exemplary damages are reasonably proportional to actual damages, (ii) the nature of the wrong, (iii) the character of the conduct involved, (iv) the culpability of the wrongdoer, (v) the situation and sensibilities of the parties, and (vi) the extent to which the wrongful conduct offends a public sense of justice and propriety. *See, e.g.*, ***Alamo National Bank v. Kraus***, 616 S.W.2d 908, 910 (Tex. 1981).

In this case, as in virtually all cases where arbitrators award punitive damages, the few safeguards imposed by the legal system on the substantive decision by the Arbitrators to award punitive damages and on the procedural aspects of the arbitration proceeding by which the punitive damages are imposed and reviewed, simply fail to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Due Course of Law provision of the Texas Constitution. As such, the Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on Mr. O'Quinn was correct because the award of

punitive damages violated the Due Process Clauses of the United States and Texas Constitutions.

C. Arbitrators should not as a matter of public policy be permitted to award punitive damages, even if the parties have expressly or impliedly attempted to bestow that authority upon the Arbitrators:

Even if this Court concludes that arbitration proceedings are constitutionally acceptable, this appeal presents the issue whether Arbitrators functioning pursuant to the Texas General Arbitration Act should, pursuant to public policy considerations, be prohibited from awarding punitive damages -- even if the parties attempt to specifically grant such authority to the arbitrators.

In *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793 (1976), the New York Court of Appeals examined this precise issue. The Court of Appeals held, not on constitutional grounds, but as a matter of public policy, that an arbitrator has no power to award punitive damages, even if the parties had attempted to bestow that power on the arbitrator. The court held that punitive damages is a sanction reserved to the state, a public policy of such magnitude as to call for judicial intrusion to prevent its contravention. *Id.* at 794. Because enforcement of an award of punitive damages as a purely private remedy would violate strong public policy, the New York Court of Appeals held that an arbitrator's award which imposes punitive damages should be vacated. *Id.* at 794.

The factors considered by the New York Court of Appeals which constituted the bases for its conclusion were:

(1) At law, on the civil side, in the absence of statute, punitive damages are available only in a limited number of instances. Punitive damages are allowed in

cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant, but to deter him, as well as others who might otherwise be so prompted, from indulging in similar conduct in the future. It is a so-called exemplary "remedy," not a private compensatory remedy. ***Id.*** at 795.

(2) Punitive damages are not available for mere breach of contract, for in such a case, only a private wrong, and not a public right, is involved. ***Id.*** at 795. Even if there was a so-called "malicious" breach of the contract, that would not permit the imposition of punitive damages. Punitive sanctions are reserved to the State. This is a public policy of such magnitude as to call for judicial intrusion. ***Id.*** at 796.

(3) The evil of permitting an arbitrator, whose selection is often restricted or can be manipulated by the party in a superior bargaining position, to award punitive damages is that it displaces the Court and the Jury, and therefore the State, as the engine for imposing a social sanction. Actual damages are measurable against some objective standard. But punitive damages take their shape from the subjective criteria involved in attitudes toward correction and reform, and Courts do not readily accept the delegation of that kind of power. Where punitive damages have been allowed for those torts which are still regarded somewhat as public penal wrongs, as well as actionable private wrongs, they have rather close judicial supervision. ***Id.*** at 796.

(4) Standards, such as whether the award of punitive damages was irrational or unjust, are subjective and afford no practical guidelines for the arbitrator and little protection against abuse. Moreover, even if such standards were imposed on the arbitration proceeding in an effort to install fairness to the system, the imposition of

the standards would be contrary to the sound development of arbitration law. *Id.* at 796.

(5) The parties to arbitration agree to the substitution of a private tribunal for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of arbitration will be destroyed. It will become a trap for the unwary, given the imminently desirable freedom from judicial overview of law and facts. It would mean that the scope of the determination by arbitrators, by the license to award punitive damages, would be both unpredictable and uncontrollable. *Id.* at 796.

(6) In imposing penal sanctions in private arrangements, a tradition of the rule of law in organized society is violated. One purpose of the rule of law is to require that the use of coercion be controlled by the State. In a highly developed commercial and economic society, the use of private force is not the danger, but the uncontrolled use of coercive economic sanctions in private arrangements is. The power to punish is a monopoly of the State and not that of any private individual. *Id.* at 796-797.

(7) The parties usually never agreed, or, for that matter, even considered punitive damages as a possible sanction for breach of an agreement. Even if the parties had sought to agree that the arbitrators could award punitive damages, the law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract. *Id.* at 797.

(8) Under common law principles, there is eventual supervision of Jury awards of punitive damages,

in the singularly rare cases where they are permitted, by the trial court's power to change awards and by the appellate court's power to modify such awards.

The Court of Appeals held that the fact the award of punitive damages was quite modest is immaterial. Such a happenstance is not one on which to base a rule. 353 N.E.2d at 797.

Other States have adopted this same holding for public policy reasons. For example, in ***Shaw v. Kuhnel & Associates, Inc.***, 698 P.2d 880, 881 (N.M. 1985), the Supreme Court of New Mexico held, citing ***Garrity***, that an Arbitrator should not be given authority to award punitive damages; this power is reserved to the Courts. In ***United States Fidelity & Guaranty Co. v. DeFluiter***, 456 N.E.2d 429 (Ind. Ct. App. 1983), the Indiana Court of Appeals held that because arbitration arises out of a contractual relationship, punitive damages are unavailable because parties may not contract to benefit from or be penalized by punitive damages. ***Id.*** at 432. ***See also, School City of East Chicago, Indiana v. East Chicago Federation of Teachers***, 422 N.E.2d 656, 663 (Ind. Ct. App. 1981).

The Trial Court's decision to modify the Award to eliminate the punitive damages purportedly imposed on Mr. O'Quinn was correct because the award of punitive damages violates important public policy concerns of the State of Texas. The policy concerns recognized by New York's highest court are true in Texas just as they are in New York. Just as the New York Court of Appeals recognized, parties agree to arbitration for purposes of deciding their disputes without the expense, delay, and rigidities of traditional courts. If arbitrators are allowed to impose punitive damages, the usefulness of arbitration will be destroyed. It will mean, just as the New York Court of Appeals predicted, that the scope of the determination by arbitrators, by virtue of the license to award punitive damages, will become unpredictable and uncontrollable. Indeed, if arbitrators can award punitive damages without being

subjected to even the controls required for a Jury to award punitive damages, and without the trial court and appellate court review required with respect to Jury awards, contracting parties will seek to avoid arbitration. On the other hand, if as a matter of public policy Arbitrators are not allowed to award punitive damages, arbitration will become an even more effective and favored means for resolving disputes between contracting parties.

B. The parties did not submit the issue of punitive damages to the arbitration proceeding:

Although it is often assumed that an arbitration award is entitled to great deference by the courts, this assumption is untrue with respect to the authority and jurisdiction of the arbitrators. To the extent possible, an arbitrator's decision as to the scope of his authority is subject to the scrutiny of the courts to ensure that the arbitrator acted properly. *E.g.*, ***E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992). An award in excess of the arbitrator's authority is void. *See, e.g.*, ***Couey v. Arrow Coach Lines***, 288 S.W.2d 192, 196 (Tex. Civ. App. -- Austin 1956, no writ). This concept is reflected in the Texas General Arbitration Act. Article 237 requires that an award be vacated when the arbitrators exceed their authority and Article 238 requires the modification or correction of an award when the arbitrators make an award on a matter not submitted to them. TEX. REV. CIV. STAT. ANN. ARTS 237 AND 238 (VERNON 1973). As detailed below, the Trial Court's finding and conclusion that the Award failed to conform either to the parties' arbitration agreement or the relief sought by Ms. Kline and that it exceeded the scope of the arbitrators' authority is correct and should be affirmed.

1. The Trial Court's *Final Judgment* was entered only after the Court had repeated opportunities to consider the issues at various hearings and after a trial:

Ms. Kline accuses the Trial Court of granting a "summary judgment sua sponte." (App. Brief 22-24). This is completely wrong. Mr. O'Quinn filed a Motion to Vacate, or, Alternatively, Modify and Correct the Award. Mr. O'Quinn subsequently filed a Motion for Judgment. There were multiple hearings on these Motions. Ms. Kline received notice of each of the hearings on these Motions. In fact, her counsel attended every single hearing and was quite vocal in expressing his views. Moreover, the procedure followed by the Trial Court is entirely consistent with the Texas General Arbitration Act. Because the Trial Court correctly followed the statutory procedure for implementation or correction of an arbitration award, Ms. Kline's rhetoric about a fictional "summary judgment" is completely misplaced.

After incorrectly describing the *Final Judgment* as a "summary judgment," Ms. Kline goes on to suggest that this Court should review the *Final Judgment* as if it were a summary judgment. In fact, the *Final Judgment* was entered only after a bench trial in which Ms. Kline and her counsel were granted their fondest wish -- unfettered reign to attack Mr. O'Quinn. Because undersigned counsel was barred from the counsel table and was not allowed to object or question witnesses -- including his own client, Mr. O'Quinn -- there was no opportunity to respond to the accusations of Ms. Kline and her counsel. Ms. Kline was allowed to do and say almost anything without control or restraint. The record in this case is but a modest example of what can occur in an arbitration proceeding -- and in this case did occur -- when a talented, aggressive, and unrestrained trial lawyer feels like he is on a roll and, irrespective of what issues were pled and submitted to the arbitrators or

what issues were defended against, in his Closing Arguments to the arbitrators asks for relief that was not presented or tried. And then there is no meaningful judicial review by the trial courts or the appellate courts of what occurred during the arbitration because of the lack of a transcript and because the theory of arbitration is that there should be limited judicial review of arbitration proceedings.

2. The Texas General Arbitration Act requires the Trial Court to modify and correct the Award in appropriate circumstances:

Articles 236, 237, and 238 provide the appropriate procedure for the implementation or correction of an arbitration award. Article 236 provides the general rule that an award should be confirmed unless a motion to vacate or modify or correct the award is timely urged. TEX. REV. CIV. STAT. ANN. art. 236 (Vernon 1973). With respect to modification, Article 238 requires a court to modify or correct the award if

> The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issue submitted . . . .

TEX. REV. CIV. STAT. ANN. art. 238(A)(2). Article 238(B) further provides that, if the application to modify or correct is granted, "the court ***shall*** modify and correct the award so as to effect its intent and ***shall*** confirm the award as to modified and corrected." ***Id.*** art. 238(B) (emphasis added).

All arbitration proceedings in this State, whether conducted pursuant to the common law, the Texas General Arbitration Act, or the Federal Arbitration Act, arise out of consensual understandings. Article 224 of the Texas General Arbitration Act makes clear that a written agreement is required to compel parties to arbitrate their disputes and the terms of the written agreement govern which disputes are submitted to arbitration. TEX. REV. CIV. STAT. ANN. ART 224 (VERNON SUPP. 1993). Because arbitration provisions are in derogation of a right of trial by Jury, arbitration is not extended beyond the terms of the contract or to issues and matters not covered thereby. *See, e.g.,* ***Seale v. Roy M. Mitchell Contracting Co.***, 321 S.W.2d 149,

150 (Tex. Civ. App. -- Austin 1959, writ ref'd). Texas courts consistently hold that the parties must have *specifically agreed* to arbitrate the particular matter in dispute. *See, e.g., **Valero Energy Corp. v. Wagner & Brown***, 777 S.W.2d 564, 566 (Tex. App. -- El Paso 1989, writ denied). Similarly, the United States Supreme Court has admonished that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." ***United Steelworkers v. Warrior & Gulf Navigation Co.***, 363 U.S. 574, 582 (1960).

Due process of law applies in arbitration proceedings just as in other legal proceedings. This means that parties are entitled to fair notice of the claims made against them. Under Texas law, a pleading must provide the opponent fair notice of the claims in issue. *See, e.g., **Stone v. Lawyers Title Ins. Corp.***, 554 S.W.2d 183, 186 (Tex. 1977). The object and purpose of a pleading is to give fair and adequate notice to the party being sued of the nature of the cause of action asserted against him so he may adequately prepare his defense. *See **Castleberry v. Goolsby Bldg. Corp.***, 617 S.W.2d 665, 666 (Tex. 1981) (holding that claims of negligence and gross negligence are not sufficient to provide fair notice that the claimant's cause of action was actually intended to be for intentional injury).

The claims that Ms. Kline presented to the arbitrators were defined by her Plaintiff's Original Petition. By letter of May 28, 1991 from Ms. Kline's counsel to Ms. Tamme S. Wilkes of the American Arbitration Association, Ms. Kline's counsel transmitted the Original Petition to the American Arbitration Association as the definition of Ms. Kline's claim. In her Original Petition, Ms. Kline alleged breach of contract, breach of an alleged tort duty of good faith, and breach of an alleged fiduciary duty. Ms. Kline pled and prayed only for actual damages, *i.e.*, economic losses. Ms. Kline did not plead or pray for exemplary damages. Indeed, there is no mention -- not one single word -- in the Original Petition about exemplary damages.

Rule 56 of the Texas Rules of Civil Procedure provides that special damages must be specifically pled. Special damages are those that result from the defendant's alleged wrongful conduct but are of such an unusual nature that they normally vary with the circumstances of the individual case in which they occur. *See Sherrod v. Bailey*, 580 S.W.2d 24, 28 (Tex. Civ. App. -- Houston [1st Dist.] 1979, writ ref'd n.r.e.). Exemplary damages are in the nature of special damages. In order to recover exemplary damages, there must be a specific claim for such damages or the allegations with respect to the alleged wrong must be pled in such detail as to comply with the fair notice requirements of Texas law. For example, in *Nipper v. U-Haul Company of San Antonio*, 516 S.W.2d 467 (Tex. Civ. App. -- Beaumont 1974, no writ), the Court of Appeals examined a pleading in which the plaintiff alleged in conclusory fashion that the defendant owed her a contractual debt, that the amount of the debt "constituted trust funds of the Plaintiff in the hands of the Defendant," and that the defendant "willfully, maliciously, and fraudulently converted such funds to his own use" -- allegations which are strikingly similar to Ms. Kline's allegations. The Court of Appeals held that as a matter of law such pleadings were insufficient to support an award of exemplary damages. *Id.* at 470.

In this case there was no pleading or prayer -- no notice whatsoever -- that Ms. Kline was asking for punitive damages. Moreover, Ms. Kline did not plead the existence of a separate and distinct tort that caused separate actual damages in tort. Each of these elements is required by Texas law before a claimant can recover punitive damages. Lawyers who are trained to recognize the necessary elements of a claim for punitive damages simply could not have known from Ms. Kline's pleadings that she was thinking about attempting to recover punitive damages. The law does not require them to guess as what Ms. Kline might be secretly planning.

3. The parties' agreement precluded the submission of the question of punitive damages:

The dispute submitted to the arbitrators arose out on a written agreement entered into among Ms. Kline, Mr. O'Quinn and Mr. Pearson relating to the apportionment of legal fees received from several cases. In this agreement, there was an arbitration provision which provides as follows:

> In the event that a dispute arises among Parties that cannot be amicably resolved or, Parties have elected to terminate this Agreement and are unable to reach an agreement to that end, said dispute shall be determined by arbitration conducted in the City of Houston, State of Texas, in accordance with the rules then in force of the American Arbitration Association. [Tr. 34]

By this agreement, Mr. O'Quinn, Ms. Kline and Mr. Pearson did not expressly, or even by implication, grant authority to the Arbitrators to award exemplary damages in connection with disputes arising out of an alleged breach of the contract in dispute. Moreover, this arbitration provision is fairly narrow -- it avoids the broad terminology frequently found in arbitration provisions that the parties submit "any and all claims, demands, disputes, controversies, or other matters pertaining to the written agreement in issue, whether or not arising independently out of the written agreement, and whether in contract, tort or otherwise." The use of the narrow arbitration provision in the agreement among Ms. Kline, Mr. O'Quinn, and Mr. Pearson thus demonstrates that the parties intended for the arbitrators to resolve contractual disputes, <u>not</u> to award exemplary damages for alleged activities outside the scope of the contract.

The arbitration provision in the contract among Ms. Kline, Mr. O'Quinn and Mr. Pearson certainly did not specifically authorize the arbitrators to award punitive damages for activities for which punitive damages may not be awarded under Texas law, *i.e.*, for breach of contract. In this case, as discussed below, the only alleged activities that could have possibly given rise to punitive damages would have been activities outside the agreement. The arbitration provision did not specifically authorize the arbitrators to award punitive damages for outside-the-contract activities. Because of the unique and harsh nature of punitive damages, it is inappropriate to assume that the parties intended the arbitration provision to authorize the arbitrators to award punitive damages for outside-the-contract activities.

While the issue is not settled in Texas, the El Paso Court of Appeals has held that the arbitrators have the power to award punitive damages -- where the parties have ***expressly*** submitted the issue to the arbitrators. ***Grissom v. Greener & Sumner Constr., Inc.***, 676 S.W.2d 709, 711 (Tex. App. -- El Paso 1984, writ ref'd n.r.e.). But the ***Grissom*** decision is not applicable here because the parties here did not expressly submit the issue to the arbitrators. It is respectfully that, as a matter of law, arbitrators should not be allowed to award punitive damages unless the parties have specifically and expressly granted that authority to the arbitrators.

Ms. Kline relies heavily on ***USX Corp. v. West***, 781 S.W.2d 453 (Tex. App. -- Houston [1st Dist.] 1989, no writ), and ***Riha v. Smulcer***, 843 S.W.2d 289 (Tex. App. -- Houston [14th Dist.] 1992, no writ). Neither of these cases support Ms. Kline's position. In ***USX***, this Court refused to mandamus Judge David West to require him to grant a motion to compel arbitration because he had already granted a motion to stay pending arbitration. ***USX***, 781 S.W.2d at 454-56. In effect, the court reviewed the pleadings and submissions to the arbitrators, concluding that they were sufficient to submit various contract and tort claims, and various types of damages, to the arbitrator.

The court then left it to the parties and the arbitrator to address pleading issues. ***Id.*** at 456-57. Significantly, however, the ***USX*** case did not address the basic question of whether an award of punitive damages is constitutional or otherwise banned by public policy.

The ***Smulcer*** case is also irrelevant. Ms. Kline seeks to analogize the present case to ***Smulcer*** because Mr. O'Quinn also unsuccessfully sought to have the arbitrators review the Award prior to its correction by the Trial Court. In ***Smulcer***, however, modification was requested because of a miscalculation. ***Smulcer***, 843 S.W.2d at 291. Here, the Trial Court modified the Award because it exceeded scope of the arbitrators' authority. (Tr. 380) As noted above, an arbitrator's view of his authority is not viewed with the same deference accorded to the merits of the arbitrator's decision. ***E. I. Du Pont de Nemours & Co. v. Local 900***, 968 F.2d 456, 458 (5th Cir. 1992). Hence, the Trial Court's decision that the Award exceeded the scope of the arbitrators' authority should be affirmed.

In addition, it is improper to read too much into the arbitrators' actions in not modifying the Award when asked. As Ms. Kline initially urged, the arbitrators may have simply decided not to consider Mr. O'Quinn's request for modification. (P. Exh. 72) Moreover, placing too much emphasis on the arbitrators' actions will discourage parties to arbitration from requesting reconsideration by the arbitrators. The Texas General Arbitration Act allows a party to decide whether to request modification of an award from the arbitrator, the trial court, or both. TEX. REV. CIV. STAT. ANN. ARTS 232 & 238 (VERNON 1973). To conserve judicial resources and promote judicial economy, the better approach is to encourage the parties to resolve all differences before the arbitrators, not the courts. Mr. O'Quinn did just that. It was only after the arbitrators failed to act that he sought modification by the Trial Court. Mr. O'Quinn should not be penalized for efforts to conserve judicial resources. Accordingly, the failure of the

arbitrators to act on Mr. O'Quinn's request should mean little, if anything.

C. Ms. Kline was never entitled to punitive damages:

1. Under Texas law, there exist, for good reason, special rules applicable to efforts of plaintiffs to recover punitive damages in connection with contract disputes:

In addition to failing to plead and pray for exemplary damages and thus failing to submit the issue of punitive damages to the arbitrators, there is another, perhaps even more important, reason why Ms. Kline as a matter of law may not be awarded exemplary damages. Texas law simply does not allow the recovery of punitive damages for breach of contract, even if the breach is intentional, willful, and malicious. *See, e.g.*, ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984); ***Amoco Prod. Co. v. Alexander***, 622 S.W.2d 563, 571 (Tex. 1981). Because plaintiffs continually attempt to side-step this rule by clever pleading, the Texas Supreme Court has established the rule that a complainant's ability in Texas to recover exemplary damages in connection with a breach of contract claim is subject to special rules and requirements. The Texas Supreme Court has held that in order to recover punitive damages attendant to a contract dispute a claimant must both (1) plead and (2) prove: (a) the commission of a separate tort, and (b) **that the claimant sustained separate actual damages as a result of that separate tort**. See, e.g., ***International Bank, N.A. v. Morales***, 736 S.W.2d 622, 624 (Tex. 1987); ***Texas Nat'l Bank v. Karnes***, 717 S.W.2d 901, 903 (Tex. 1986); ***Jim Walter Homes, Inc. v. Reed***, 711 S.W.2d 617, 618 (Tex. 1986); ***Bellefonte Underwriter's Ins. Co. v. Brown***, 704 S.W.2d 742, 745 (Tex. 1986).

Simply alleging, as Ms. Kline did, that the defaulting party to a contract allegedly also breached some tort duty, *e.g.*, fiduciary duties or an implied duty of good faith and fair dealing, will not suffice. There must also be pleading and proof that the separate and distinct tortious conduct caused the claimant to sustain separate and distinct actual damages in tort. It is only the separate actual damages in tort that will support a claim for exemplary damages! *See, e.g.*, ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745.

In a further attempt to side-step these requirements, plaintiffs frequently argue that their economic losses in fact are their required "tort" damages. The Texas Supreme Court has rejected this argument. The Court has established the doctrine that if the actual damages sustained by the claimant are economic losses arising out of breach of the contract involved in the litigation, then no matter how the complainant disguises or characterizes her so-called tort claims, the dispute is simply one of breach of contract. *See, e.g.*, ***Crim Truck & Tractor Co. v. Navistar***, 823 S.W.2d 591, 594-95 (Tex. 1992); ***Southwestern Bell Telephone Co. v. FDP Corp.***, 811 S.W. 2d 572, 577 (Tex. 1991); ***Southwestern Bell Telephone Co. v. Delaney***, 809 S.W.2d 493, 495 (Tex. 1991); ***International Bank***, 736 S.W.2d at 624; ***Texas Nat'l Bank***, 717 S.W.2d at 903; ***Jim Walter Homes***, 711 S.W.2d at 618; ***Bellefonte Underwriter's Ins. Co.***, 704 S.W.2d at 745; and ***Amoco Prod. Co.***, 622 S.W.2d at 571.

In this case, there was no pleading of separate tortious conduct by Mr. O'Quinn that caused separate actual damages in tort to Ms. Kline. Ms. Kline alleged that she sustained economic losses resulting from alleged breach of contract. Ms. Kline claimed she was entitled to monies owed to her under the contract, plus interest. The Award of actual damages made her whole. But then Ms. Kline presented the conclusory rhetoric commonly found in pleadings of this nature, the rhetoric which the Texas Supreme Court has consistently held

gives rise only to a claim for breach of contract. Ms. Kline made the conclusory allegations that Mr. O'Quinn breached an alleged duty of good faith and breach an alleged fiduciary duty. But, even if such allegations were true, which is denied, Ms. Kline did not plead and prove any separate actual damages in tort (*e.g.*, mental anguish, etc.) caused by the alleged tortious conduct. Thus, while these other extraneous allegations may sound bad (in fact, that is why plaintiffs usually add them into their petition when suing on a contract), they do not convert the case into a tort dispute and they will not support an award of punitive damages.[5/]

Unfortunately, there is no transcript of the arbitration proceeding. Hence, this Court must rely on the pleadings and other submissions in order to determine what was submitted to the arbitrators. Although Ms. Kline suggests that it is somehow Mr. O'Quinn's fault that there is no transcript, Ms. Kline also failed to seek a transcript. Hence, the absence of a transcript cannot support any presumption against any particular party to the proceeding.

2. Ms. Kline also failed to plead and prove the type of intentional conduct necessary to support an award of punitive damages:

[5/] In most situations where a plaintiff is suing on a contract and is also attempting to recover exemplary damages, the plaintiff at least pleads that he or she is seeking exemplary damages. This at least gives the defendant fair notice of the plaintiff's intentions. But here Ms. Kline not only failed to plead and prove separate actual damages in tort to support an award of exemplary damages -- but did not even plead or pray for exemplary damages at all!

Assuming that Ms. Kline had actually pled and proved separate actual damages in tort sustained as a result of breach of an alleged duty of good faith and fair dealing and/or an alleged fiduciary duty, she still would not be entitled to punitive damages. A breach of the duty of good faith and fair dealing by itself does not entitle the injured party to punitive damages. A breach of a fiduciary duty by itself does not entitle the injured party to punitive damages. In order to recover exemplary damages for breach of the duty of good faith and fair dealing or breach of fiduciary duty, a complainant must also plead and prove and obtain the additional finding of fraud, malice, or gross negligence. *See* TEX. CIV. PRAC. & REM. CODE § 41.003 (VERNON SUPP. 1993); ***Burk Royalty Co. v. Walls***, 616 S.W.2d 911, 922 (Tex. 1981) (addressing the issue of exemplary damages in general); ***Arnold v. Nat. County Mutual Fire Ins. Co.***, 725 S.W.2d 165, 168 (Tex. 1987) (addressing the issue of exemplary damages in connection with claim of a breach of a duty of good faith and fair dealing); ***Manges v. Guerra***, 673 S.W.2d 180, 184 (Tex. 1984) (addressing the issue of exemplary damages in connection with a claim of breach of fiduciary duty). Because Ms. Kline did not plead or prove this additional element, she was never entitled to an award of exemplary damages for breach of the alleged torts of good faith and fair dealing and/or fiduciary duty. Hence, the Final Judgment should be affirmed.

3. Although the Federal Arbitration Act is not applicable to this situation, guidance is provided under the FAA with respect to when arbitrators have exceeded their authority:

At various times in the hearings before the Trial Court, Ms. Kline has argued that the Federal Arbitration Act and

federal substantive law governs the resolution of these issues. More frequently, however, Ms. Kline has argued that the Texas General Arbitration Act governs. Indeed, by arguing the application of the Texas General Arbitration Act, Ms. Kline was able to prevent Mr. Pearson from attacking the award of punitive damages against him, *i.e.*, Mr. Pearson had failed to comply with the requirements of Articles 237 and 238 of the Texas General Arbitration Act. [SOF 21-32]

Nevertheless, as a result of a relatively recent decision by the United States Supreme Court, it is clear that federal substantive law does not apply in this situation. Even if this transaction did affect interstate commerce, the preemptive effect of the Federal Arbitration Act has been significantly diminished by the United States Supreme Court in ***Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University***, 489 U.S. 468 (1989). In ***Volt***, the Supreme Court held that the Federal Arbitration Act is not so much a "pro-arbitration" statute as it is a "pro-agreement" statute. ***Id.*** at 476. That is, the Federal Arbitration Act mandate is not that disputes be arbitrated, but that agreements to arbitrate be enforced. The Court thus held that when the parties choose the laws of a particular state, they also implicitly agree that state law will apply to the extent it is not in direct conflict with the Federal Arbitration Act. ***Id.*** at 477. In this case, the Agreement included a choice of law provision providing that "This Agreement shall be construed and enforced in accordance with and governed by the laws of the State of Texas." [Tr. 35] Thus, Texas law governs the outcome of this dispute, irrespective of whether the arbitration proceeding is conducted under the Federal Arbitration Act or the Texas General Arbitration Act.

Recently, the United States Court of Appeals for the Second Circuit in ***Barbier v. Shearson Lehman Hutton Inc.***, 948 F.2d 117 (2nd Cir. 1991), considered a situation where an Arbitration Panel rendered an award of punitive damages in connection with a contract dispute in which the parties had

chosen New York law. The Barbiers contended that the application of the ***Garrity*** rule, discussed above, conflicts with federal law and thus should be ignored because State law is preempted by the Federal Arbitration Act. ***Id.*** at 121. The Second Circuit rejected this argument. Citing ***Volt***, the Second Circuit held that the Federal Arbitration Act requires that private agreements to arbitrate be enforced in accordance with their terms. The court noted that the parties elected to abide by the laws of the State of New York in the event of a dispute under the Agreement. The Second Circuit held that the measure of damages is a matter of state substantive law. Because the arbitrators were not entitled to award punitive damages under the laws of the State of New York due to the choice of law provision in the parties' agreement, "it is manifest that the Panel exceeded its authority in awarding punitive damages." ***Id.*** at 122. Thus, the Second Circuit held that the trial court should have vacated that portion of the arbitrators' award which granted punitive damages. ***Id.*** at 123.

The decision is instructive. The Texas General Arbitration Act similarly provides in Section 237 that if the arbitrators exceed their power, this is a basis for vacating an award. Additionally, under Article 238, the fact that the arbitrators have awarded upon a matter not submitted to them is a basis for modifying or correcting an award. As in the case of ***Barbier***, it is manifest that the Arbitrators exceeded their authority when they attempted to award punitive damages when the matter was not submitted to them based on a claim for economic losses for breach of contract. The Trial Court was correct in entering the *Final Judgment* modifying the Award to eliminate the punitive damages against Mr. O'Quinn.

II. The Trial Court properly refused to award attorney's fees incurred in connection with efforts to confirm or enforce the Award:

The Arbitrators considered the *transaction* submitted to them and made certain awards. One of the determinations made by the Arbitrators was:

> Each party shall bear its own attorneys fees and share equally in the fees and expenses of arbitration.

Ms. Kline did not complain about this aspect of the Award within the statutory ninety (90) day period to seek modification. Later on, however, she sought to avoid the arbitrators' ruling and to re-litigate this issue. Ms. Kline clearly waived any right to such fees by failing to seek modification or correction of the Award. *See* TEX. REV. CIV. STAT. ANN. arts. 236 & 238 (requiring the court to confirm the Award unless a request to vacate or modify or correct is timely urged).

Even if the arbitrators had been silent as to the issue (which they were not), and even assuming that Ms. Kline timely sought modification of the Award (which she did not), the Texas courts refuse to allow the recovery of such fees. In ***Kermacy v. First Unitarian Church of Austin***, 361 S.W.2d 734, 735-36 (Tex. Civ. App. -- Austin 1962, writ ref'd n.r.e.), the court denied the request for attorney's fees incurred by a plaintiff in connection with efforts to enforce an arbitration award. The court reasoned that the plaintiff's cause of action was merged into the arbitrator's award and a suit to enforce the award was essentially a new claim for which there was no statutory basis for recovering attorney's fees. Just as in ***Kermacy***, Ms. Kline is not entitled to recover any attorney's fees resulting from her efforts to enforce the arbitration award. Indeed, the Award expressly denies Ms. Kline the right to attorney's fees.

In addition to the *res judicata* effects of the Award, there is still another reason for affirming the Trial Court's refusal to award attorney's fees to Ms. Kline. Article 238-1 of the Texas General Arbitration Act provides that "costs of the application [to confirm, modify, or correct an award] and of the proceed-

ings subsequent thereto, and disbursements may be awarded by the court." TEX. REV. CIV. STAT. ANN. ART. 238-1 (VERNON 1973). It is significant to note that, with respect to awarding costs, Article 238-1 provides that the costs "may be awarded" by the court. This use of the permissive is extremely important because Articles 236, 237, 238, and the first sentence of 238-1 (all of which deal with confirming, vacating, or modifying or correcting the award) use the mandatory term "shall" instead of the term "may." ***Compare Id.*** art. 238-1 ***with Id.*** arts. 236-238.

Because the Texas General Arbitration Act expressly allows the Trial Court discretion with respect to an award of costs, the Trial Court's decision not to award Ms. Kline her fees and costs may be reversed only for an abuse of discretion. Given the express language of the Award, the *res judicata* effects as articulated in ***Kermacy***, and the provisions of Article 238-1, it is clear that the Trial Court did not abuse its discretion. Accordingly, the Trial Court's refusal to allow Ms. Kline to recover her attorney's fees and costs in connection with enforcing the Award should be affirmed.

III. The Trial Court properly refused to allow Ms. Kline to litigate the single issue of punitive damages:

Ms. Kline sued Mr. O'Quinn alleging non-payment of attorney's fees allegedly due her under agreements to which she and Mr. O'Quinn were parties. It is absolutely clear from Plaintiff's Original Petition that the *transaction* at issue here is the non-payment of attorney's fees with respect to certain lawsuits, *e.g.*, the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, the ***Goings*** case, and so forth. As reflected in Plaintiff's Original Petition, the claims made by Ms. Kline against Mr. O'Quinn pertained to a *transaction* consisting of several contractual agreements with respect to the contingent fees that might be obtained.

By agreement of Ms. Kline, Mr. O'Quinn, and Mr. Pearson, the *transaction* was submitted to arbitration. Ms. Kline's

Demand for Arbitration described the dispute to be arbitrated as a "[d]isagreement among attorneys over contingent fee recoveries." In addition, Ms. Kline used her Plaintiff's Original Petition to define her claims before the arbitrators. The May 28, 1991, letter of Mr. Kline's attorney to the American Arbitration Association stated that Ms. Kline's Plaintiff's Original Petition "states Ms. Kline's position on the matter in controversy more clearly than the papers previously submitted . . . ." As noted, Plaintiff's Original Petition clearly describes the transaction at issue as the non-payment of attorney's fees in connection with the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, and the ***Goings*** case.

On September 21, 1992, Ms. Kline filed Plaintiff's First Amended Original Petition, which recounts the existence of the agreements and Ms. Kline's claim against Mr. O'Quinn for "the non-payment of money to her and failures to account to her." Ms. Kline's "Causes of Action" were stated as (1) a confirmation of the Award and (2) a breach of contract claim against Bank One. In her Prayer for Relief in Plaintiff's First Amended Original Petition, Ms. Kline sought confirmation of the Award and "actual damages with pre-judgment interest from Bank One." Hence, Plaintiff's First Amended Original Petition presented a cause of action only against Bank One.

It was only after the Trial Court ruled that the arbitrators exceeded their authority in attempting to award punitive damages and that Ms. Kline was not entitled to attorneys' fees in connection with having the Award confirmed, that Ms. Kline changed her position. At that point, Ms. Kline filed her Plaintiff's Second Amended Original Petition in this Cause. In this new pleading, Ms. Kline included a request for "punitive damages against Mr. O'Quinn due to his breach of fiduciary duty against her." In Mr. Riedmueller's October 22, 1992, letter to the Trial Court, he asserted that "the question of Ms. Kline's right to punitive damages against Mr. O'Quinn" remains. Despite this assertion, Ms. Kline's Second Amended Original Petition, and also her Third Amended Original Petition, failed

to raise any new claims against Mr. O'Quinn because they failed to plead any new *transaction.*

The *res judicata* effect of the Award bars any later claim by Ms. Kline for punitive damages or other relief based on that same conduct or factual *transaction*. This is because Texas has adopted the *transactional* view of *res judicata*. *See* ***Getty Oil Co. v. Insurance Co. of North America***, 845 S.W.2d 794, 798 (Tex. 1992), petition for cert. filed, 61 USLW 3836 (June 1, 1993); ***Barr v. Resolution Trust Corp.***, 837 S.W.2d 627, 631 (Tex. 1992). Under this view, a judgment on the plaintiff's underlying claims generally extinguishes all rights of the plaintiff to any and all remedies which may be available with respect to any part of the *transaction* which formed the basis for the first suit. In ***Barr***, the court emphasized that the determination of what constitutes the transaction at issue "requires an examination of the factual basis of the claim or claims in the prior litigation. It requires an analysis of the factual matters that make up this gist of the complaint, without regard to the form of action." ***Id.*** at 630. As detailed below, this view of *res judicata* applies to the Award and thus bars Ms. Kline's efforts to litigate the issues of punitive damages and attorney's fees.

The Arbitrators considered the relevant facts about the *transaction* at issue. Ms. Kline sued because of the non-payment of fees which were allegedly due her with respect to the cases in issue, *e.g.*, the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, the ***Goings*** case, etc. Both Ms. Kline's Plaintiff's Original Petition and her Demand for Arbitration made clear that the relevant *transaction* at issue is the lack of payment of fees. Consequently, the Award is *res judicata* against whatever other remedies or relief Ms. Kline sought or could have sought against Mr. O'Quinn in connection with such *transaction*.

The Texas cases hold that an arbitration award has the same *res judicata* effect as a final judgment. ***Albert v. Albert***, 391 S.W.2d 186, 188-89 (Tex. Civ. App.--San Antonio 1965,

writ ref'd n.r.e.); ***Ferguson v. Ferguson***, 127 S.W.2d 1018, 1020-21 (Tex. Civ. App.--Eastland 1939, writ dism'd). In ***Albert***, the court applied the principle of *res judicata* to prevent a disappointed party from later seeking additional relief based on the underlying factual dispute which was the subject of an arbitration award. In ***Albert***, the arbitrators considered a dispute involving the dissolution and winding up of a partnership. After accepting the award, the disappointed party then sued for negligence. In holding that the new claim was barred, the court observed as follows:

> Once a valid award is made, it and the submission upon which it is founded are the sole basis for any further determination of the rights of the parties with respect to any demands embraced in the submission, for the latter are merged and extinguished in the award.

Albert, 391 S.W.2d at 189.

In ***Ferguson***, the court quoted a treatise on judgments as follows:

> The effect of a valid award upon the matters submitted to the arbitrators is equivalent, so far as the question of estoppel is concerned to, to the effect of a valid judgment . . . . Not only is the original cause of action merged in the award, if valid, and a subsequent action upon it barred, but it is likewise res adjudicata [sic] as to the matters directly in issue in subsequent litigation before [sic] the parties.

Ferguson, 127 S.W.2d at 1020-21; *accord* WILLIAM V. DORSANEO, 2 TEXAS LITIGATION GUIDE § 40.01[4] (1993); G. M. WILNER, DOMKE ON COMMERCIAL ARBITRATION § 31:02 (1984); RESTATEMENT (SECOND) OF JUDGMENTS § 84(1) (1982). Consequently, the Award itself precludes any further litigation of the transaction (i.e., the "disagreement" among Ms.

Kline and Mr. O'Quinn over the contingency fees) submitted to arbitration.

Ms. Kline never alleged a new *transaction*. She simply presented the same *transaction* (*i.e.*, the disagreement over contingent fee recovered with respect to the ***Liberty Waste*** cases, the ***Helm*** case, the ***Cook*** and ***Mayfield*** cases, the ***Goings*** case, etc.) and the same *claim* (*i.e.*, breach of alleged fiduciary duty) and then tacked on a request for punitive damages. Because this *same claim* with respect to this same *transaction* was presented to the Arbitrators, it cannot be presented again. *See, e.g.*, ***Barr***, 837 S.W.2d at 631; ***Albert***, 391 S.W.2d at 188-89; ***Ferguson***, 127 S.W.2d at 1020-21. Even if this particular *claim* had not been presented to the Arbitrators, it still would be barred because it pertains to the same *transaction* that Ms. Kline presented to the Arbitrators. *See* ***Barr***, 837 S.W.2d at 630. (*res judicata* analysis focuses on the "factual matters that make up the gist of the complaint, without regard to the form of action"). Consequently, the *res judicata* effect of the Award bars Ms. Kline from re-litigating the issue of punitive damages.

There is a vast difference between seeking review of an arbitration award versus seeking to re-litigate the *transaction* considered by the arbitrators. Indeed, the Texas General Arbitration Act specifically provides for proceedings to "confirm" an award, as well as to "modify" an award. *See* TEX. REV. CIV. STAT. ANN. arts. 236, 237, & 238 (Vernon 1973). Mr. O'Quinn's efforts to seek modification of the Award to set aside the punitive damages award, with which the Trial Court has agreed, do not undermine the *res judicata* effect of the Award. Indeed, Article 238(B) specifically provides that, if a request for modification of an award is granted, the court shall modify and correct the award and then confirm the modified award. This is exactly what the Trial Court did. Accordingly, the Final Judgment should be affirmed.

IV. If this Court decides that a new trial is appropriate, then Mr. O'Quinn should be entitled to additional discovery and a new trial:

At the pretrial conference in this Cause, the Trial Court relieved Ms. Kline of the obligation to answer and respond to Mr. O'Quinn's outstanding discovery requests. From the transcript of the pretrial hearing, it is clear that the Trial Court did so based upon her decision to allow Ms. Kline to go to trial only with respect to Bank One, not with respect to Mr. O'Quinn. Consequently, if the Court now concludes that Ms. Kline is entitled to a new trial against Mr. O'Quinn, Mr. O'Quinn should be entitled to pursue additional discovery from Ms. Kline.

In addition to precluding Mr. O'Quinn from discovery, the court also refused to allow Mr. O'Quinn's counsel to participate in the trial. When the trial began on December 21, the court ordered Mr. O'Quinn's counsel to leave counsel table and sit in the gallery. The court further ordered that Mr. O'Quinn's counsel refrain from objecting to the statements and testimony taken during the trial. Obviously, if Ms. Kline is entitled to go forward with a trial on her claim for punitive damages, Mr. O'Quinn is entitled to be heard.

Of course, the *Final Judgment* reflects the relief Mr. O'Quinn sought. Accordingly, if the *Final Judgment* below is affirmed by this Court, then Mr. O'Quinn believes that there is no further need for additional discovery or a new trial.

IV. Conclusions:

Contracting parties elect to submit their disputes to arbitration for the purpose of a private, speedy and fair resolution, without the delays and rigidities of a court trial. They expect the disputes to be submitted to arbitration to be contractual disputes arising out of the contract. They do not expect the arbitrators to award punitive damages, particularly when the

law does not allow the recovery of punitive damages for breach of contract.

It is one thing for contracting parties to submit to arbitration the issue of contractual compensatory damages, which are largely based on objective criteria. But punitive damages are entirely different. They are subjective and, as the New York Court of Appeals noted in ***Garrity***, take their shape from attitudes towards correction and reform. Because the award of punitive damages is so subjective, supervision by the courts is required. The need for supervision is heightened by virtue of the abbreviated discovery in arbitration (which can function to deny the defendant from developing the facts necessary to refute the plaintiff's allegations) and the fact that arbitrators historically do not adhere to the rules of evidence and are willing to listen to anything, no matter how irrelevant, emotional and prejudicial.

Because one of the underlying theories of arbitration is that there should be minimal court review and supervision, allowing arbitrators to award punitive damages will lead to unpredictable, uncontrolled, non-reviewable awards of punitive damages. This violates public policy concerns of the State, as well as fails to comply with the Due Process Clause of the United States and Texas Constitutions. The Trial Court's *Final Judgment* in this case eliminating the award of punitive damages against Mr. O'Quinn was thus entirely correct.

Should this Court conclude that policy and constitutional concerns do not require barring arbitrators completely from awarding punitive damages, those same concerns do, however, require that at the very least arbitrators may not award punitive damages except where the contracting parties have expressly granted them the authority to do so. Here the narrowly drawn contractual arbitration provision did not authorize the arbitrators to award punitive damages. The Trial Court's *Final Judgment* in this case eliminating the award of punitive damages against Mr. O'Quinn was entirely correct for the additional

reason that the arbitrators were not authorized to award punitive damages.

Moreover, this is a case in which the claimant did not properly lodge a claim for punitive damages. The intent of the parties that the arbitrators may not award punitive damages is reflected by the fact that Ms. Kline did not plead for such damages and presented no claim that would support the award of punitive damages. She sought only economic losses for breach of contract. It was only after the close of evidence that Ms. Kline's counsel (obviously believing he had successfully attacked Mr. O'Quinn), asked for such damages. Ms. Kline made this belated request even though Texas law does not allow the recovery of punitive damages under these circumstances. The Arbitrators, completely contrary to the law, nevertheless awarded such damages. This action by the Arbitrators exceeded their authority. It is respectfully submitted that the Trial Court was correct in modifying the Award to vacate the portion thereof where the Arbitrators exceeded their authority.

Mr. O'Quinn respectfully urges that the Trial Court's *Final Judgment* be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this BRIEF OF APPELLEE JOHN M. O'QUINN was served upon each of Donna C. Kline, Thomas J. Pearson, and Bank One, Texas, N.A., by mailing a copy of same via certified mail, return receipt requested, to their respective counsel of record as follows:

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This 13th day of September, 1993.

/s/ Steve Borgman